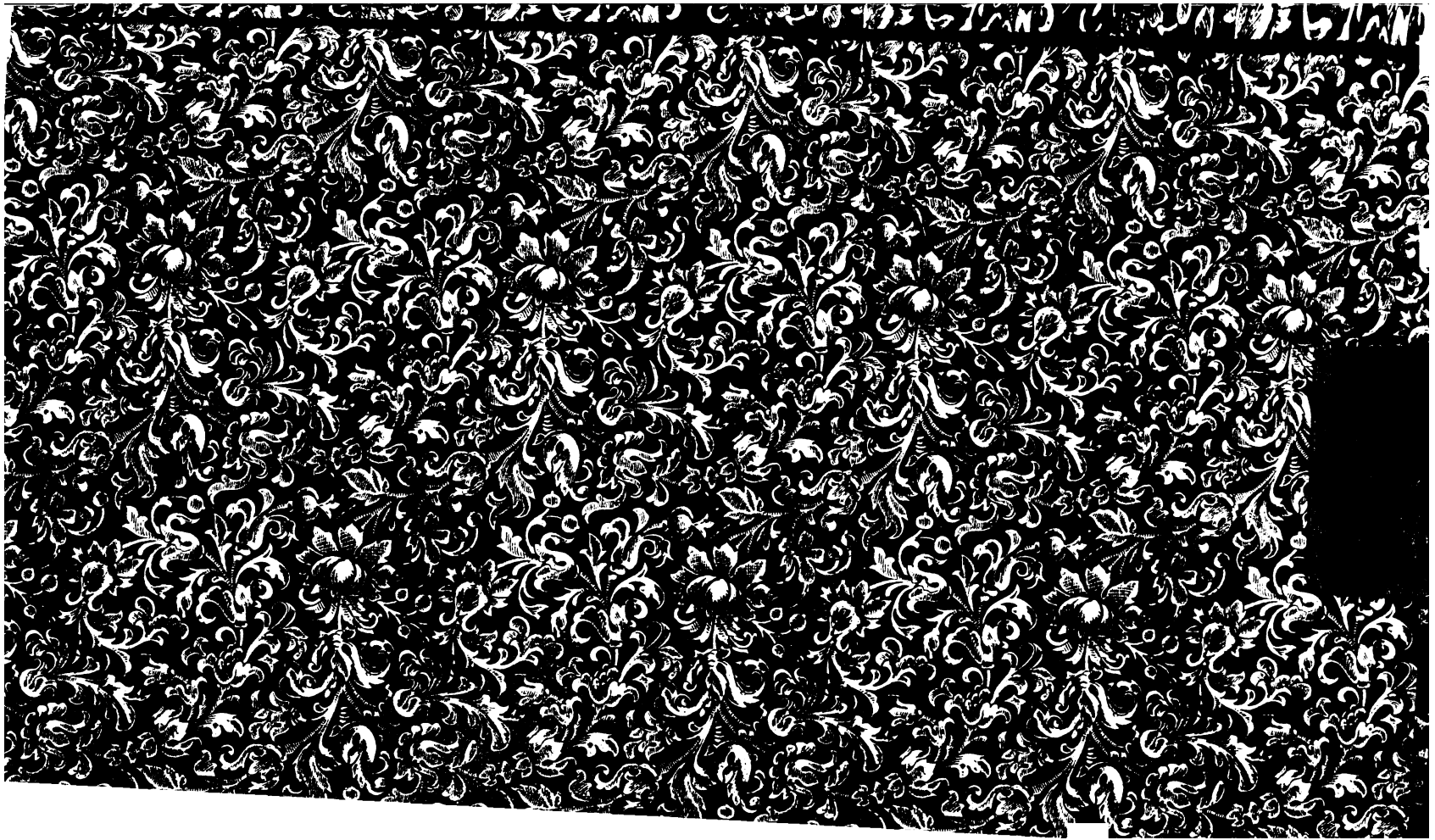

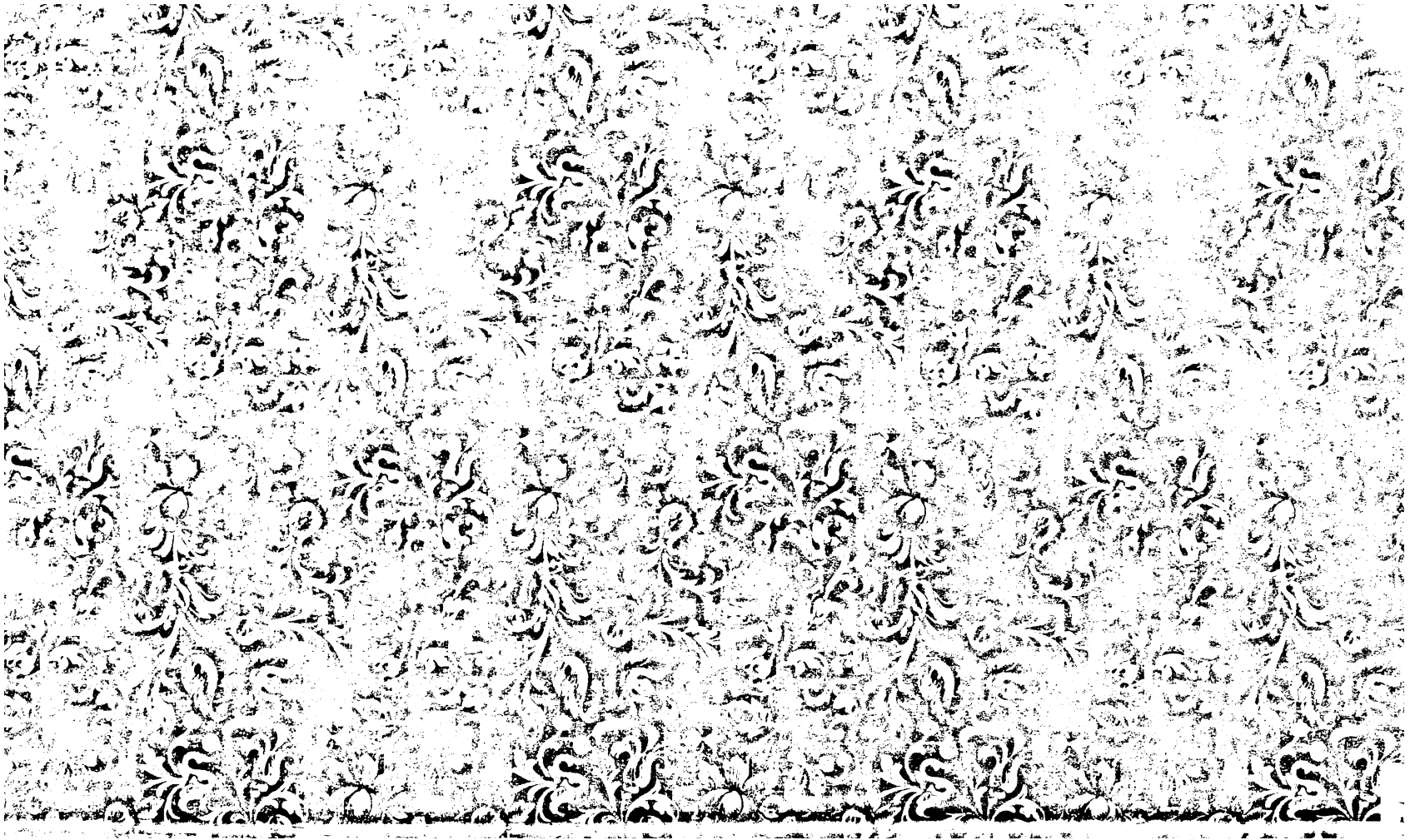

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A

TREATISE

ON

RENTS.

BY THE LATE

LORD CHIEF BARON GILBERT,

OF HIS MAJESTY'S COURT OF EXCHEQUER.

PHILADELPHIA:

JOHN S. LITTELL,

Law Bookseller and Publisher.

HALSTED AND VOORHIES, NEW YORK.

1838.

J. VAN COURT, PRINTER,
Quarry, near Second st.

PREFACE.

THE following Treatise on Rents was sent from Ireland, together with a History of the Court of Exchequer, by a person of the highest station in the law; in order to their being published here, as works equally curious and useful from the accurate and copious knowledge they convey; as well in a speculative as practical view. The greatest assurances were at the same given, that they were written by the late Lord Chief Baron Gilbert: which, together with the correspondence there appears betwixt the contents of them, and the heads of a greater work, which were in his own hand-writing, amongst other curious manuscripts collected by a gentleman of the law, and lately sold, leave not the least room to doubt his Lordship being the author of them. But had there not been this information with respect to their production, the works themselves display so much learning and experience, joined to great natural abilities, as could not fail to raise the author to great eminence and consideration in the law; nor could indeed so ample a cognizance of the matters treated of, especially with regard to the History of the Court of Exchequer, have fallen in the way of any, but one thoroughly well versed in the business of that Court in a judicial capacity.

As to what regards this Treatise in particular, little need be said further in its recommendation. There is no part of the law more extensively useful and interesting, than that which makes the subject of it, and yet perhaps no part in which those niceties and distinctions, that are essential both to rights and the means of recovering them, are less understood, either doctrinally or practically. For the teaching by the citation of determined cases, the almost universal method of writing on these matters, is very ill suited to explain a system of law dependent on the antient policy of the country, and the changes which alteration of circumstances have in the later times made necessary in it, and which in fact can be only fundamentally understood by a just historical view of that policy, and those changes: a manner in which this subject has never been hitherto treated of.

It may be objected, that this work is insufficient to the end proposed, because several acts of Parliament, made since the time it was written, have varied the law with relation to rents: but on consideration this will be found to occasion only a trivial diminution of the value of this tract.

Those acts of Parliament are but few, and mostly confined to the means of recovering rents due, in common cases; they are also in general well known to persons concerned in practice, or at the worst easily recurred to; and therefore do not properly constitute a part of those difficulties intended to be removed by this Treatise: while the doctrinal principles, and points of common law, on which, as well the knowledge of the rights themselves, as of the means of security and recovery of them depend, are little affected by later acts of Parliament, and make the most abstruse, and far greatest part of what is necessary to be understood, by either those who are in the practice of the law, or concerned in conveyancing. Those who seek to obtain a clear and distinct knowledge of the nature of rents, and the practice with regard to them, as founded on the law of England, will not be disappointed in the assistance they may hope for from the title of this work. The learned and elaborate author has searched for the principles in the original policy and usages which gave rise to them. He has traced down the changes in the practice to near the present time; deduced the reasons from those obvious alterations of circumstances which occasioned them; and conveyed the whole in so intelligible and comprehensive a manner, as can scarcely fail to give such a just notion of this subject, either with respect to doctrine or practice, as will leave little necessary to those who make themselves masters of what he has furnished; and the part which may be wanting to complete the knowledge of what relates to rents, *viz.* the variation made by the *later acts of Parliament*, is so much in the reach of every one as renders the deficience of little consequence.

OF RENTS.

ALL property, by our law, is presumed to have been originally in the crown; and the king portioned it out in large districts to the great men that had deserved well of him in the wars, and were able to advise him in time of peace. This was the nature of their tenure; and these were all the services the king expected in return for such concessions. But these large districts or countries would have been but of little use, either to the lords or to the public, if they had continued in their own hands: in such a case they must, in the midst of their large territories, have wanted almost the necessaries of life; and the public that strength and security, which land well peopled and cultivated produces and yields. From hence it became necessary to subdivide those territories; and the division must necessarily *have been made among two sorts of men, to answer the several necessities of the lord and the public;— [*2] the *military men* to attend the lord in the field, and venture their lives for their country;(*a*)—and the *socmen* to plow the demesnes which the lord kept in his own hands for the support of his own table, or to make an annual return of corn and other provisions for that use and purpose: and hence, by the way, the lands which the socmen held were called *farms*, from the Saxon word *feorm*, which signifies provisions.

These corporal services,(*b*) as money multiplied and trade increased, were changed into money by the consent of the tenants, and the desire of the lords; and, as the military tenure began to decline, they admitted of compositions from the feudal tenant for not attending his lord in the field, and those compositions were ascertained by Parliament after the war was over, which was called *escuage:* this change of the services seems to have been for the ease and advantage of the lords, *because they were no longer obliged to carry their own [*3] provisions to the camp, when they had money from their tenants, which in every place would sufficiently provide them with all the necessaries of life.

The remedy for the recovery of rent is by the way of *distress*, which seems to have come over to us from the civil law; for anciently, in the feudal law, the not paying attendance on the lords courts, or not doing the feudal service, was punished with the forfeiture of the estate; so is *Vigellius*,(*c*) in the title *Causæ ex quibus Feudum amittitur: viz.* "Si vassalus domino non serviat, fidelitatemq; ei non præstet; si vassalus, a domino ejus vocatus, non venerit; si pactum feudi non servietur:" but these *feudal forfeitures* were afterwards turned into *distresses*, according to the pignorary method of the civil law; that is, the land that is set out to the tenant is *hypothecated*, or as a pledge in his hands, to answer

(*a*) Lit. sect. 119. (*b*) Ibid. (*c*) Vigellius, 257, 271, 326.

the rent agreed to be paid to the landlord; and the whole profits arising
[*4] from the land, are liable *to the lord's seizure, for the payment and satisfaction of it.

Besides this, the lord had another security by the feudal law for the faithful performance of his services: and that was, the solemn engagement made by the tenant upon his first entering into the feud, by the doing *homage*, and taking the oath of *fealty;* by which the tenant solemnly swore and undertook, to bear faith to him for the lands which he held, and lawfully to do the customs and services which he ought to do at the terms assigned him: from hence came that connection between the lord and tenant, in the feudal law, that dependence and attendance of the tenant in all the circumstances of life and articles of danger; and, in return of that service and fidelity, the utmost protection the lord could give him:(*d*) "Debet quidem tenens manus suas utrasq' ponere inter manus utrasq' domini sui; per quod significatur, ex parte domini, *protectio, defensio,* et *warrantia;* et ex parte tenentis, *reverentia* et *subjectio.*"

[*5] *This oath of *fealty* or fidelity was, we see, taken by the tenant on account of the lands holden from the lord; for so says the tenant,—"*That he will be faithful to the lord for the lands which he holds;*"—and therefore this engagement must subsist while the tenure between the lord and tenant remains: and it was looked upon to be so sacred an obligation, and so necessary to be punctually observed, that originally, as we have observed, the breach of it was attended with no less a penalty than the forfeiture of the *feud* itself; and, afterwards, when the rigour of that law came to be mitigated, with a seizure of every thing that was found on the land: now the distress being substituted instead of the seizure of the *feud,* we may easily account, why the power of distraining always attended the *fealty,* or, as the law books term it, was inseparably incident to it; because the power of seizure could only belong to him in whose *homage* the tenant was, and to whom the lands must
[*6] return when the feudal donation to the tenant *was spent; for it had been unreasonable and absurd, that the tenant should forfeit his land for not paying a service to a person to whom he never obliged himself by any oath or engagement: and hence it is, that if the lord upon the donation had reserved to himself any gable or rent, and had afterwards granted the rent to a stranger, though the tenant had attorned, or consented to the grant, yet the stranger could not distrain for the rent; for as the power of seizure, so the distress that was substituted in its place, belong only to him of whom the lands were held, and in whom the right of *reverter* was when the feudal donation was spent; and, therefore, the stranger who could pretend no such right from the grant, could have no power of seizing the *feud* for the non-payment of rent, nor consequently of distraining, because then the land would be liable to two different seizures at different times.

So it was upon lesser donations:(*e*) as if a lease had been made for life,
[*7] reserving *rent, and the lessor grants the rent, the grantee has no remedy for the recovery of it, for the former reason: but if the reversion itself had been granted to a stranger, the whole services incident to it had past; and the grantee, after attornment, might

(*d*) Bracton, fol. 8. Co. Lit. 65, a. (*e*) Co. Lit. 143.

well distrain, because the tenure must necessarily be of him to whom the lands must return when the feudal donation is spent; and the tenant must owe his fidelity to him whose tenant he is, because it were contradictory, to make him bear faith for the same land to different persons; therefore the obligation of his first oath of fidelity must cease, since he no longer holds any land of him to whom he made it. But these things will be considered more at large in treating of rents under the following division:

I. What a *rent service* is; and the several sorts of rents.

II. Out of what things *rents* may issue; and upon what conveyances they may be reserved.

*III. By what *words* a rent may be reserved or created: how *several* rents may be reserved in one deed: and of the days of payment in law. [*8]

IV. To whom rents may be reserved or granted: by what words the rent, being reserved, may be continued to those that are to have the reversion after the death of the lessor.

V. The *remedies* for the recovery of rent: and in what cases a demand is necessary; and at what place and time it must be made.

VI. What acts of the lessor or lessee amount to a *discharge* of the rent; and herein of the *eviction* of the land; the *suspension*, *extinguishment*, and *apportionment* of the rent.

*I. *What a Rent Service is;* and *the several Sorts of Rents.* [*9]

It is an annual return made by the tenant,(f) either in labour, money, or provisions, in retribution for the land that passes: this is properly a rent service; and is called so, because the antient retribution was made by the corporeal service of the tenant, in plowing his lord's demesnes; and at this day, the tenant does the coporal service of *fealty*.

Rent Service is two-fold, either { *expressed* in the contract, or raised by *implication* in law.

When the services are *expressed* in the contract, the *quantum* must be either certainly mentioned,(g) or be such, as by reference to something else may be reduced to a certainty; and, therefore, Littleton(h) describes a RENT SERVICE to be, "*Where the tenant holdeth his land of his lord by fealty and* certain *rent, or by homage, fealty, and* certain *rent, or by other *services and* certain *rent:*" and the reason is this; because if the lord's demands be uncertain, it is impossible [*10] to give him an *adequate* compensation for them: for whether the service consists in the labour of the tenant, or in gable or rent, the lord cannot, upon his *avowry*, recover damages for the non-performance or non-payment, when the jury cannot determine what injury he has sustained.(i) And hence it is, that the lord cannot distrain his tenant in *frankalmoigne*, for the duty of such tenant being to make orisons, say prayers and masses, and perform other divine services for the soul of the feoffor, but the number of them being not expressed, the service is altogether uncertain; and therefore the remedy is before the Ordinary, who may inflict ecclesiastical censures for such omission.

(f) 1 Vent. 161. Co. Lit. 142, a.
(g) Lit. sect. 213.
(h) Co. Lit. 96, a. 142, a.
(i) Ib. sect. 135, 136.

But if the tenant holds from his lord,(*k*) *to shear all his sheep feeding in such a manor*, this is certain enough; because it is easy to compute the number within the precincts of the manor, and, consequently, what
[*11] expense the lord is at in employing other hands at *that work, and what damages he has sustained by the omission of his tenant.

SERVICES IMPLIED, *are such as the law obliges the tenant to perform when there are none contracted for in the grant;* and those are more or less, according to the duration of the gift. Thus at common law, before the statute of *quia emptores terrarum*, if the tenant made a feoffment in fee, without any reservation of services, the feoffee held by the services by which the feoffor held over; because the services, being an incumbrance on the land, which the tenant could not discharge without his lord's consent, must follow the land in whosoever hands it comes; and this construction was the more reasonable, because when the strength and safety of the nation depended upon a due and punctual performance of the services of the military tenure, it must have weakened the strength of the nation, to have suffered any man, by an unwary grant, to discharge any proportion of land from the *feudal* service for ever.

[*12] *So when after the statute *de donis*(*l*) the feudal right of *reverter* was turned into a *reversion* in the feoffor, the law, for the former reasons, obliged the tenant in tail to do the same services to the donor, which he was obliged to by his superior lord; because this was an estate of inheritance, which possibly might have continued for ever, and therefore might be attended with the same inconvenience to the public, if the law did not create the usual services where there were none reserved, and oblige the donee to perform the same which the donor is answerable for to his lord *paramount*.

Hence it is,(*m*) that if A. seised of two acres, one holden of B. by knights service, and 12*d*. rent, and the other acre of C. in socage, and 1*d*. rent, makes a gift in tail of both acres, without any reservation; though the donor has but one reversion, yet the donee holds by two distinct tenures, and different services; and, pursuant to the tenure and the ser-
[*13] vices, the avowry of the donor must be several, *because the donee must hold as the donor held over.

There are these *exceptions* out of this rule;

First, That if tenant by *grand serjeanty* maketh a gift in tail(*n*) without any reservation, the donee shall not hold by *grand serjeanty;* because the tenure is always of the *person* of the king, and the services of it are always performed to him in *person;* but the donee shall hold by *knights* service, because that is the service that comes the next to *grand serjeanty*.

Secondly, If the tenant makes a gift in *frank-marriage*, the donees shall not be obliged to perform the services which the donor held by; for they shall hold by *fealty* only, until the fourth degree be passed.

But the law did not make the construction on *leases for lives* or *years;*
[*14] for if the lessor makes no reservation, *the law implied none, except *fealty*, which every tenant that has a determinate interest must do; because it is necessary that there should be some mani-

(*k*) Co. Lit. 96, a.
(*l*) Co. Lit. 23, a. Lit. sect. 19.
(*m*) Co. Lit. 23, a. c.
(*n*) Co. Lit. 23, a.

festation of tenure, since all lands must be held of somebody: and the reason why the law raised no other service on these gifts was; because they, being of a short duration, could not be attended with the inconvenience of the former: for besides that the life of a man is short and uncertain, and the terms for years at first were but very short, the inconvenience of such free grants was still the less; because the lessor himself was still answerable for the services to his lord; and, therefore, since his life was as good as the lessee's, there was at least but a distant prospect of any public mischief from such free gifts.

But since the statute of *qui emptores terrarum*,(*o*) if a man makes a feoffment in fee, or a lease for life, or gift in tail, remainder over in fee, the feoffee shall hold of the superior lord, by the same services which the feoffor or donor held by; because by *that act, the tenure upon such donations must be of the capital lord, and not of [*15] the feoffor; wherefore upon such grants there can be no rent *service* reserved at this day to the feoffor; because the feoffee is not obliged to swear *fealty* to him, inasmuch as he is not in his *homage* by the infeudation, and consequently not obliged to do any services to him for lands which he holds from the capital lord.(*p*) But since the statute, if a man makes a lease for life, or gift in tail, saving the reversion to himself, with a reservation of rent or other services, this is a rent *service*, for which the law gives the donor or lessor a remedy by *distress*, as before the statute; for neither the lessee or donee is *feoffatus* within that act; because there is a reversion in the donor sufficient to support the tenure of him.

Therefore in the case of a feoffment in fee,(*q*) or a lease for life, the remainder in fee, if the feoffor reserves a rent, such rent is *seck*, because it is unprofitable to the feoffee, he having no remedy for the recovery of it. *The reason whereof is, because the land out of which [*16] the rent is reserved is not held by the feoffor, and consequently the feoffee is not obliged to take the oath of fealty to him for lands which are held of another; and where there was no *fealty* due, there could be no *seizure*, by the old law, for the non-performance of the services, and consequently no *distress* without a particular provision of the parties: wherefore in such deeds of feoffments, if a rent be reserved, there must be a clause of *distress* inserted to make the reservation of any benefit to the feoffor, and then it is called a rent *charge*, because the land is charged with a distress for the nonpayment of it.

It seems to have been a doubt,(*r*) whether such reservations were good in a deed *poll*, because that is the sole act of the feoffor, and the words of the reservation proceed entirely from him; whereas in an indenture, every clause is as much the act or words of the feoffee as the feoffor. But it is now held, that reservation is good in deed *poll*, because whoever claims an estate under *any deed ought, in reason and [*17] equity, to be obliged to take it under the terms expressed in the deed.

Another way of creating a rent *charge* is thus;(*s*) the tenant grants a yearly rent out of his lands to another for life in fee or in tail, with a

(*o*) 2 Inst. 505.
(*q*) Ibid. 217, 218.
(*s*) Lit. sect. 218.
(*p*) Lit. sect. 214.
(*r*) Co. Lit. 143, (b.) 2 Roll. Ab. 449.

clause of distress; and this seems the most ancient way of creating them, for it is but reasonable to suppose, that when the absolute property of the *feud* came to be established in the feudiary, this method was soon taken up to provide for his younger children, or answer his other extraordinary occasions; and the whole bulk of the estate, notwithstanding such grants, descended to the heir entire, to support the dignity of the family: and there was this further conveniency, that these grants might be made without the consent of the lord of whom the land was holden, because there was no stranger introduced into the *feud.* Whereas by the feudal law, the tenant could not make a disposition of any part of the *feud* without the lord's license: but though upon these accounts, these
[*18] grants *might have been frequent and prevailed much, yet the grantee could have no remedy by *distress*, without such remedy had been particularly provided in the deed of grant; because there could be no forfeiture of the *feud* by the old law for nonpayment of this sort of Rent; for that were to admit a stranger into the *feud* without the consent of the lord: and therefore the *distress*, which was substituted in the room of the forfeiture, could not be derived to the grantee from the nature of the grant itself: and this construction on the grant the rather obtained, because such grants were against the policy of the feudal law; since they were so far from producing any strength or safety to the public, that they really lessened and impaired it: in as much as the feudal tenant who made the grant was the less able to perform the duties of the military tenure to his Lord, and must come worse provided and equipt into the field, when so much of the annual profits were annually devested to answer such grants.

[*19] *A *rent* granted *for equality of partition* by one co-parcener to another is good, but this can be no rent *service*, because there is no tenure of the parcener to whom it is paid, nor does the co-parcener who pays it do *fealty* to the other for the lands out of which it issues: And it were unreasonable to construe it a rent *seck*, because the co-parcener has really parted with a share of her inheritance in *lieu* of it: and since co-parceners are compellable by law to make partition, and some inheritances cannot commodiously be divided without injury to the estate, to construe such a rent a rent *seck* were to obstruct partitions, for no parcener would look upon such rent as an equivalent for any part of her estate, if she had no remedy for the recovery of it: wherefore the law has construed such rent a rent *charge of common right;* that is, the law, to encourage such partitions, has given a *distress* for recovery of it, on this ground of reason, because the parcener has given a valuable recompence in consideration of it.

[*20] *So, and for the same reason, it is in case of a rent granted to a Widow out of lands whereof she is *dowable*,(*t*) in lieu of her dower; because there are some things whereof a woman is dowable that in their nature are *indivisable;* and therefore, to prevent brangles in such cases, and because the widow has really given a valuable compensation for the rent, the law gives her a remedy for recovery of it by way of *distress*,—the like law of a rent granted in lieu of lands upon an *exchange.*

(*t*) Co. Lit. 169.

II. *Out of what things rents may issue; and on what conveyances they may be reserved.*

No rent can issue out of any incorporeal *inheritance which lies in* grant; because they are such things in their nature as a man can never recur to for a *distress:*(*u*) for instance, if I have a right of commonage in another man's soil, I grant it to A. reserving rent; if the rent be behind, I *cannot distrain the beasts of A. because the right of commonage which every man has runs through the *whole* common, and I cannot say, that any *particular* part of the common is mine more than another: therefore it follows, that since no man can distrain for rent but on the premises demised, and it is impossible to discover any particular part of the common which I have a separate right to, to demise that, I can have no remedy by way of distress for the rent reserved, nor can I have remedy by assize if the rent be withheld from me, for the same reason; in as much as the recognitors of the *assize* cannot have the view of any *particular* part of the common to which I have a right, and therefore cannot put me in *seisin* of the rent by a twig or turf of the common. [*21]

So it is for *tythes*, for a reservation of rent upon a lease of them is not good; because there is no place upon which the distress can be taken, or any land to be put in *view* to the *recognitors*,(*v*) *or of which they may give *seisin* by a twig or turf.(*w*) [*22]

But it has been decreed in equity, that where a rent *charge* of 40*l.* was devised out of a rectory, the glebe whereof amounted to but 40 shillings a year,(*x*) that the whole rectory should be liable to the payment of the rent, and the proprietor of the rectory was decreed to pay the arrears of rent and costs.

But a reservation out of these sort of inheritances is good to the king;(*y*) because the king by his prerogative may distrain all the lands of his lessees for such rent: and therefore, since he has a remedy for the rent, there is no reason that such reservation should not be good.

Another reason why a rent issues not out of the *incorporeal* inheritance is this; because every *incorporeal* right (till by age it was formed into a prescription) did originally rise by grant from the crown, and such grants seem to be made for particular purposes, as *the grant of a fair, to be under the protection of the Lord,—the grant of an *advowson*, that the patron should appoint *able* and *fit* persons to the Church without any prospect of profit,—and of *common*, for the benefit of the beasts of every one of the tenants. And therefore to let such *incorporeal* inheritance for *gable* or *rent* was esteemed contrary to the design and purpose of such grants: but the *corporeal* rights of the feud were trusted to the lord to create a *dependency* for the better service of the government; and therefore as he might *hire* them for the personal service and attendance of tenants, so for the same reason he may do it for his own profit, since such profit makes him better able to serve the government. [*23]

(*u*) Co. Lit. 47, a. 142, a. 2 Roll. Ab. 446.
(*v*) Cro. Ja. 111. 2 Roll. Ab. 446, 451. Co. Lit. 47, a. 142, a.
(*w*) Bro. 67. 80. 11 H. 4. 40. 5 Co. 3, a.
(*x*) 1 Chan. Ca. 79. Thorndicke v. Allington. V. post.
(*y*) Co. Lit. 47, a.

And hence it is that though a reversion and remainder be *incorporeal*, and can pass only by *grant*,(z) yet a rent reserved upon a *grant* of them is good: for though the grantor has no remedy for them during the continuance of the *particular estate;* yet, since they relate to the lands [*24] which were originally *granted to make profit of, the judges have gone as far as they could to pursue the intention of such original donations; and therefore have admitted such reservations to be good *immediately*, since the lands in which the grantor had the reversion were originally given for that purpose, *viz.* to make profit of. And this construction is the more reasonable, because in this case there is a remedy by *distress* for all the arrears when the reservation executes by the determination of the *particular estate;* whereas there is no possibility of such remedy in the case of *tythes, commons, fairs,* &c.

So if there be lord, mesne and tenant, and the mesne maketh a gift in tail of the mesnalty, reserving rent, such reversion is good;(a) because the tenancy may *escheat* to the donee, and then the donor has remedy by *distress* for all the arrears.

But if a lease for *years* be made of an *incorporeal* inheritance which lies only in *grant*,(b) reserving rent; such reservation is good to bind [*25] the lessee *by way of *contract;* for the non-performance whereof, the lessor shall have an action of debt; because if the lessee undertakes to pay such an annual sum by his deed, such undertaking constitutes a right to it. And the law in all cases gives remedies adequate and correspondent to every man's right:—Otherwise it is if they be leased for *life;* because no action of debt lies for rent reserved upon a lease for life; for reasons which will be given under this head.

If a man makes a lease of black acre to commence *in futuro*,(c) and of white acre to begin *in præsenti*, rendering rent payable at Michaelmas before the commencement of the term in black acre, this is a good reservation *immediately;* for it is but one entire rent, and as such is payable according to the reservation.

So it is, if a man grants a future interest in land; as if it be a lease for years, to commence five years after the making of the lease, the lessor [*26] may reserve a rent *immediately;* because this *is a good *contract* to oblige the lessee to pay; and the lessor may have an action of debt on the contract, and may likewise have his remedy by distress for the arrears when the lessee comes into possession.

A lease of the *vesture* or *herbage* of land reserving rent is good; because the lessor may come upon the land to distrain the lessee's beasts feeding thereon.(d)

On what Conveyance a Rent Service may be reserved.

That it may be reserved upon every conveyance that passeth *any estate to the tenant or* enlarges *an estate already in him.*(e) For the rent being an annual return by way of retribution for something given,

(z) Co. Lit. 47, a. Bro. 47. 1 Co. 62, b. Capell's case. Perkins, sect. 627.
(a) Perkins, sect. 627.
(b) Co. Lit. 47, a. 5 Co. 3. Jewel's case. 2 Sand. 303.
(c) 2 Roll. Rep. 467. Falstaf's case. (d) Co. Lit. 47, a. Rol. Ab. 446.
(e) Co. Lit. 144, a. 10 E. 4. 3, b. 21 H. 6. 8, b. Co. Lit. 193, b. 2 Rol. Abrig. 449.

it follows, that where no estate passeth by the conveyance, there ought to be no retribution or return. Besides, the thing given was anciently in nature of a *pledge* for the rent, and therefore ought to be such as the giver might formerly have revested himself in, and now may have *recourse to for a distress for non-payment of the rent: [*27] hence therefore it is, that if the *disseisee* release all his right to the *disseisor*, reserving rent, the reservation is void.

So it is if there be a lord and tenant, and the tenant holdeth of his lord by *fealty* and 20*s.* rent, and the lord *releases* to his Tenant, or confirms his estate in the tenancy,(*f*) yielding to him a hawk or a rose yearly, this new reservation is void; because there is no estate given to the tenant, for which he should make that new return of service to his lord: though upon such release or confirmation he may confirm the tenant's estate to hold by lesser services, as in this case by *fealty* and 5*s.* rent, for by the same reason that he may release his *seignory*, he may likewise abridge himself of part of it.

So if there be tenant for life, and he in the reversion releases to him in *tail*, reserving rent,(*g*) the reservation is good; because the tenant's estate is *enlarged* by the release; and therefore *the rent reserved ought to be paid in return for the inheritance given by the [*28] releasor, and he has an *immediate* remedy by *distress* for recovery of it.

So, says my Lord Coke, it is upon a release that enures by way of *mitter le estate;*(*h*) as when one joint tenant releases to another, a rent may be reserved: but Q. if such release carries the fee-simple, whether such rent be a *rent service;* inasmuch as the releasee being in from the first feoffor, there can be no *tenure* of the releasor, and consequently the rent must be *seck*, unless there be a clause of distress in the deed of release: for so it is in case of a feoffment in fee-simple, since the statute or *quia emptores terrarum*, as is said before.

At common law no rent could be reserved upon a *bargain* and *sale*, because only an use passed,(*i*) which was not an estate to which the bargainor could have had recourse for a distress, but now by the statute of 27 of Hen. 8. the *possession* is *executed* to the use, *and [*29] therefore the bargainor may have recourse to the land for distress.

There can be no rent reserved upon any conveyance,(*k*) that enures by way of *extinguishment* of the estate of the grantor; because in such case there is no reservation left in him to create a *tenure:*—And therefore if a lessee surrenders his estate, reserving rent, the reservation is not good. But the case put by Rolls must it seems be understood of a lease for life with such a reservation;(*l*) for such a reservation, may be good by way of contract upon a surrender of a lease for years: for when the lessor takes an assignment or surrender of the lessee's term, he agrees to take it under such a yearly rent, and such agreement or contract is a

(*f*) Lit. Sect. 438, 439. Co. Lit. 305. Dy. 230. b. Moor 631, b. Co. Lit. 193, b.
(*g*) Co. Lit, 193, b. 10 E. 4, 3, b. 13 Co. 55.
(*h*) Co. Lit. 139, b. 10 E. 4, 3, b. al con.
(*i*) 2 Rol. Ab. 448. Co. Lit. 144, a. Cro. Eliz. 595. Wicks v. Tillard. 2 Co. 54. 2 Inst. 673.
(*k*) 2 Rol. Ab. 449. but the Ab. says, fans fait q.
(*l*) 2 Leon. 80. Ray 222. Godb. pl. 183. 1 Vent 242, 272. 2 Mod. 147.

good foundation for an action of debt if it be not performed, whether the agreement be by deed or parol.

[*30] *III. By what *words* a rent may be reserved or created. How several rents may be reserved in one deed.

Of the times of payment in law.

And here first of a rent service: this, as has been said, being something in retribution for the land that passeth, it must be reserved by such *words* as imply a *return* of *something* that was not in the grantor before, in lieu of the land given;(*m*) and therefore *reddendo*, *reservando*, *solvendo*, *inveniendo*, and such like, are proper words by which a rent-service may be reserved.

But if a man maketh a lease of lands *except* 12*d.* or *præter* 12*d.* rent; these are no good reservations:(*n*) because these are only words proper to reserve to the lessor part of something in being, and which would otherwise pass by the lease.

So it is if a man makes a lease *salvo*, or saving 20*s.* rent, this is no [*31] good reservation; because there can be no *saving of any thing not in *being:* and consequently, a rent-service being a return of something, *not in the lessor*, in lieu of the land given, cannot be reserved by *words* that, in their most extended signification, can only reserve something in *esse*.

But if there be lord and tenant by knight's service,(*o*) and the tenant makes a gift in tail to hold by a penny, *salvo forinseco servitio*, that is, saving to the tenant such service by which he held the land of his lord; this is good to make the donee hold by knight's service: for though the tenant had not the service in himself before the gift, yet it was a service in *being*, for the tenant was obliged to do it to his lord; and therefore it is but reasonable, that he might save that service to himself, which he was, at the time of the gift, obliged to perform to another.

So it is, if there be lord, mesne and tenant,(*p*) and the mesne holds by knight's service, and the tenant by socage, if the tenant makes a gift in [*32] tail reserving rent, and saving the *knight's service: the donee, in this case, shall likewise hold by knight's service: because this service was in *being*, and chargeable upon the land at the time of the gift, though the tenant was not obliged to do it himself; and therefore may be reasonably saved to him, who parts with the land upon which it was before chargeable: and the rather, as such construction is most beneficial to the public, and the donee not injured thereby, because he willingly takes it under such charge.

By articles of agreement indented, between A. and B. it is covenanted and agreed, that A. doth let black acre to B. for five years from Michaelmas following:(*q*) provided always, that B. shall pay at Michealmas and Lady-day 10*l.* by even portions yearly; this proviso is a good reservation of the rent: for as the words amount to an immediate demise of the land, so the rent, which is but a retribution for the land, ought to be paid immediately; and it cannot be construed to be a sum in gross, because

(*m*) Co. Lit 47. a. 2 Rol. Ab. 449. Perk. Sect. 625. Plow. Com. 132. b. 137. b.
(*n*) Perk. 693. And these, as Perk. observes, are words which are meant always of things that the lessor has in his own possession, at the time of the lease made.
(*o*) Perk. sect. 650. (*p*) 2 Rol. Ab. 449.
(*q*) Moor 459. Cro. Eliz. 482. 2 Rol. Ab. 449. Fairinton v. Wise.

by the words of the articles, (*which, being indented, are the words of both parties,) it is to be paid yearly. [*33]

If lands be leased to A. and he covenants and grants to render and pay, for the said lands every year during the said term, to the lessor, his heirs and assigns, 10*l;* this amounts to a reservation.(*r*) So it is, if the lessor covenants that the lessee shall hold and enjoy the land; and the lessee, *in consideratione præmissorum*, covenants to pay the lessor, his heirs and assigns, an annual rent of 10*l.* during the term; for here the rent is plainly given as a retribution for the land which the lessee holds; and this being by indenture, the words are looked upon to be spoken by both parties, and therefore may reasonably be construed, that the lessor, in consideration of the land demised, reserves the rent agreed upon, by way of retribution or return: and therefore it has been adjudged, that such rent goes with the reversion to the heir; and the executor of the lessor shall never recover by virtue of the covenant.

*When the reservation of the Rent is made by proper words, in what cases they admit of *several reservations* in the same *lease.* [*34]

And here a difference is to be observed, between a rent *reserved intire in the reddendum*, upon a demise of several things in the same lease,(*s*) (for the reservation shall be taken as one and *intire;*) and where rent is *not at first reserved intire*, but upon the reservation is *several*, and *apportioned* to the several things demised:—For instance, if a lease be made of several houses, *rendering* the annual rent of 5*l.* at the two usual feasts, *viz.* for one house 3*l.* for another 10 shillings, and for the rest of the houses the residue of the said rent of 5*l.* with a clause of re-entry into all the houses for non-payment of any parcel of the rent: this is but *one* reservation of *one intire* rent; because all the houses were leased, and the 5*l.* was reserved as one *intire* rent for them all;(*t*) and the *viz.* afterwards does not alter the nature of the reservation, but only *declares the value of each house. But if the lease had been of [*35] 3 houses,(*u*) rendering for one house 3*l.* for another 20*s.* and for the third 20*s.* with a condition to re-enter into *all* for the non-payment of *any parcel;* these are three *several* reservations, and in the nature of three distinct demises, for which the *avowry's* must likewise be several; for each house, in this case, is only chargeable with its own rent; the *intire* sum being *not at first reserved* out of all the houses demised, and afterwards *apportioned* to the several houses according to their respective value, as in the former case: but the particular sums are at first reserved out of the several houses; and therefore the non-payment of the rent of one house can be no cause of entry into another.

So if the lessor had reserved out of one house 3*l.* during 5 years,(*v*) and 20*s.* out of another house during 10 years, and reserve another rent out of the second to commence 10 years after; these are distinct reservations and several demises, and each house is subject to a distress for its own rent.

(*r*) Plow. Com. 131. 134. a. Cro. Car. Drake v. Monday. Cro. Ja. 398. 2 Roll. Ab. 449. 1 Rol. Rep. 80, 81. Altho v. Heming. 2 Bulst. 281. Sir William Jones, 231.

(*s*) Hob. 172. Moor 51, 52. 5 Co. 54, 55. 2 Rol. Ab. 448. Moor 199, 202. Knight's case.

(*t*) Dyer 339. b. 2 Rol. Ab. 448. Winter's case. 5 Co. 55.

(*u*) Moor 98, on this distinction, V. post.

(*v*) 5 Co. 55. 2 Rol. Ab. 448.

[*36] *So if A. demises the scite and demesnes of the manor of C.;(w) and also the manor of C.; and all other lands and tenements thereunto belonging, reserving for the said scite, and demesnes and premisses therewith letten, 8*l.*; and for the said manor and premisses therewith letten 9*l.*; this is not a joint but a several lease, *viz.* one lease for the scite and demesnes, and another for the residue of the manor; and the reservations are also several and distinct.

If a lease be made of two manors, *habendum* one manor for 20*s.* and the other manor for 10*s.* these are several reservations; and each manor is charged with its respective rent.

A. made a lease of a cellar for a year,(x) and if at the end of the year the parties should agree that the demise should continue, then to have and to hold the same for 3 years, *reddendo inde annuatim durante dicto termino* 40*s.*; this is one *intire* reservation, as well for the [*37] first year as for the three years: for the words *dicto *tremino* extend to both terms indifferently.

And as there may be several reservations in the same lease, by the *words of the parties*, so there may by *act of law;* as when a lease is made to an abbot or bishop in their *public* capacities, and T. S. reserving a rent; the lessees are not *joint-tenants*, but tenants in *common:* and therefore the reservation must be several, and the reversion, to which the rent is incident, must follow the nature of the particular estates on which it depends; and therefore must be several too.

So if there be two tenants in common, and they make a lease for life, rendering rent;(y) this reservation, though made by *joint* words, shall follow the nature of the reversion, which is *several*, in the lessors; and therefore they shall be put to their several *assizes* if they be disseised, as if there had been *distinct* reservations: but if the reservation had been of an horse or an hawk, which is not in its own nature *severable*, [*38] then, for the necessity *of the case, the law admits them to join in one *assize.*

By what *words* a rent *charge*, or rent *seck*, may be granted, and the manner of creating them.

A rent *charge* and a rent *seck* differ only in this,(z) that the grantee has a remedy for the recovery of the former without an *actual seisin*, but not for the latter:—The granting them or creating them may be considered together: and the common and safe way is to do it in this manner: when a man seised of lands grants, by deed poll or indenture, a yearly rent to be issuing out of the same land, to another, in fee, in tail, or for life, *&c. with* a clause of distress, this is a *rent charge;* and if the grant be *without* clause of distress, this is a rent *seck.*

And since the statute of *quia emptores*,(a) *&c.* if a man makes a feoffment in fee, reserving rent, and *if the rent be behind, that it shall be* [*39] *lawful for him to distrain*, this is a *rent charge;* *the word *reserving* being in this case construed by some to amount to a grant of the feoffee;—but such rent, without the clause of distress, would be *seck.*

And in many cases, without words of granting, the law creates a *rent*

(w) Cro. Eliz. 341. Tanfield v. Rogers.
(x) 10 Co. 106. a. 107. b. Layfeild's case, Hob. 276.
(y) Lit. Sect. 314. Co. Lit. 197. a. Moor 202.
(z) Lit. Sect. 218. (a) Lit. Sect. 217. Plow. 134. a. Co. Lit. 170. a.

charge; because it is the design of the law to render all contracts binding and effectual, so far as the intention of the parties may be gathered from the deed;(*b*) and such interpretation is made *strongest* against the grantor, because he is presumed to receive a valuable consideration for what he parts with: and hence it is, that if a man obliges himself to T. S. in an annual rent of 10*l. percipiendum annuatim de manerio de* D. and bindeth the said manor, and all the chattels therein to a distress; this amounts to a good grant of the rent, and T. S may distrain for it.

So if I bind my goods and lands to the payment of a yearly rent to F. S. this a good rent charged with power to distrain,(*c*) though there be no express *words of *grant or distress:* or if I grant, that, if such rent be in arrear, F. S. shall distrain for it in the manor [*40] of D. this is a good rent charge; for in all these cases it is evidently my intention that my land be liable to the charge, when I bind it to the payment of such a rent, or I give F. S. a power to distrain for it in my land; for the distress that I impowered him to take is in the nature of a pledge, which always supposes that it shall remain in the person's hands to whom it is given, till it be redeemed by the payment of the money for which it is originally taken.

So it is, if I grant to F. S. that he and his heirs, or the heirs of his body,(*d*) shall distrain for 40*s.* rent in my manor of D.; this is a good rent *charge* in fee or in tail: because the power of distraining is in one case given to the heirs general, and in the other to the descendants of the body of F. S. and whoever has a power of distraining, has an *estate* in the rent for which the distress is given, for the former reasons.

*But if I grant a rent of 40*s.* out of the manor of D. and if the rent be behind, that the grantee shall distrain in my [*41] manor of S.; this power of distress in my manor of S. shall not amount to the grant of a *rent charge* out of the manor of S.: for though, in the former cases such construction is admitted to support the intention of the parties, where the grant is not explicit; yet in this case, the reason of such construction fails;(*e*) because here is a plain grant of the rent out of the manor of D. and the distress is given in S. as a means for the recovery of it, for which he had no remedy by the grant itself; and therefore the rule, *expressum semper facit cessare tacitum,* takes place here; that where the intentions of the parties are evident, there that construction shall never be admitted, which the *law* only allows in *dubious* contracts, *ut res magis valeat quam pereat;* for if that manner of interpretation were admitted, the grant might be made double, and the grantor twice charged, against the design of the grant.

*Thus if there be lord and tenant by certain rent,(*f*) and the tenant grants by indenture to his lord, that he may dis- [*42] train for the same rent in all his lands within the same town, and he hath other land there; yet this grant does not create a *new* rent, but only gives a more extensive remedy for the old; for though there be a distress to the lord, in land which he could not distrain for before the grant; yet, by the express words of the parties, that distress is only a remedy for the

(*b*) 2 Rol. Ab. 424.
(*c*) Co. Lit. 147. a. 2 Rol. Ab. 424. Bro. tit. Rents 14.
(*d*) Co. Lit. 147. a. 2 Rol. Ab. 424. 7 Co. 24. a. Lit. Sect. 221.
(*e*) 2 Rol. Ab. 425. Co. Lit. 147, a. 7 Co. 24. (*f*) 9 H. 6, 9.

rent already in being; and therefore by no *implication* ought to be extended to a new grant.

If a rent be granted to A. and if the rent be behind, that a stranger shall distrain for it, for the *use* of the *grantee;* this is a good *rent charge* in A. and the distress limited to a stranger for his benefit, is, in effect, making him the grantee's servant for that purpose;(*g*) and what a man may do by one servant, he may do by himself, or any other.

[*43] *But if the distress had been limited to a stranger, without saying for the *benefit* of the *grantee;* so that the limitation of the distress may seem to be independent on the grant, and without relation to it; this distress does not make it a *rent charge,* since, by no words in the deed, the distress shall be applied to the use or advantage of the grantee.

If a man grants a rent out of three acres, and grants over, that if the rent be in arrear, the grantee shall distrain for the rent in one of the acres (naming it:) this is one *intire* rent, but it cannot be a rent charge for the whole; because the greatest part of the land out of which it issues, is not chargeable with any distress for the recovery of it: and *denominatio sumenda a majori,* it is taken to be a rent *seck;*(*h*) for, by the words of the grant, the grantee can distrain only in the one acre: and whenever the remedy by way of charge for the rent is *non-commensurate* to the rent, the rent is called *seck,* and the charge *is

[*44] only an appurtenant or appendix to the rent, and does not give it its denomination: and the reason is, because, if the original grant should be lost or worn out by time, and a man were to *prescribe* for it, if he were to give it the denomination of a charge, it would grasp more land, than was originally intended to be charged; and therefore the law binds them down to the domination of the rent as *seck,* and to set forth the charge as an appurtenant, that by length of time no more should be comprehended in the charge, than was originally intended in the grant of that charge.

So it is if a rent be granted to two and their heirs out of one acre, and that it shall be lawful for one of them and his heirs to distrain for it, this is a rent *seck;* and the distress given to one is only appurtenant to the rent; and this comes within the reason of the former rule, because both the grantees have not a remedy by way of charge commensurate to the rent granted. But if he, to whom the distress was *not* limited, dies,(*i*)

[*45] the survivor *shall distrain; because the whole rent is then in him, and the remedy by distress, which was given to him and his heirs, ought, in reason, to be extended to the recovery of the whole estate given, and he is now in *seisin* of the whole rent under the first grant.

If A. leases a manor for life, rendering 5*l.* rent, and afterwards grants this *rent* in fee to B. to have after the death of tenant for life, and that B. may distrain for it after the death of the tenant for life, this is a good grant of a rent charge of 5*l.* to B. in fee;(*k*) for though A. granted only the 5*l.* reserved upon the lease, and that grant was not to take effect till after the expiration of the lease; yet inasmuch as the grantee has power to distrain after the death of tenant for life, it should seem, as if he had

(*g*) 1 Rol. Ab. 425.
(*h*) Co. Lit. 147, b. 7 Co. 24, b.
(*i*) Co. Lit. 147, b. 7 Co. 24, b.
(*k*) 2 Rol. Ab. 425.

granted the 5*l.* reserved upon the lease, only to ascertain the *quantum* of the rent which the grantee should have out of the manor after the expiration of the lease; for *falsitas demonstrationis non destruit veritatem rei.*

*So if A. grants and confirms to B. a rent of 5*l.*(*l*) to be taken out of his lands, *which rent* A. *has of the grant of his father;* though A. had never any such rent from his father, yet this grant of A.'s shall be good to *create* a rent charge in B.: for it is evidently the intention of A. that B. shall have a rent of 5*l.* out of his land; and a mistake or error, in the description of the thing referred to, shall not render the true design of the contract ineffectual and void. [*46]

If a man grants a rent out of his land to F. S. and his heirs, and grants that he may distrain for it *during his life*, this is a rent charge in F. S.; because he may distrain the land out of which it issues, during his own life: but it shall be *seck* in the hands of his heirs, because by the express words of the deed the remedy was to cease upon his death. *Aliter* if the distress had been limited only for years; for then the intire rent had been *seck:* because the remedy being temporary, is not adequate to the right which is *perpetual; and a remedy inadequate and not correspondent to a man's right is no remedy at all. [*47]

If a man seised of 20 acres of land,(*m*) grant a rent of 20*s. percipiendum de quâlibet acrâ terræ suæ*, or out of every acre of his land; this is in the nature of a several grant out of every acre; for the grant shall be taken most strongly against the grantor, and the grantee shall have 20*s.* out of each acre.

If there be two tenants in common, and they grant a rent of 20*s. per annum* out of their land, the grantee shall have 40*s.* rent;(*n*) for as their estate is several, so shall their grant be too: and therefore each shall be taken to grant a several rent of 20*s.*

If a rent be granted in the manor of D. *percipiendo* of 100 acres parcel of the said manor, with a clause of distress in the said 100 acres; this rent affects only the 100 acres: for the last words explain in what part of *the manor the rent and the distress shall be taken. [*48]

If A. bargains and sells land to B. by indenture,(*o*) and, *before inrollment*, they both join in a grant of a rent charge to E.; this, after the inrollment, shall be construed the grant of B. and the confirmation of A.: because, when the bargain and sale is inrolled, it has the effect of a deed inrolled from the *making thereof;* and therefore it must be the grant of B. who had the land at the time of the grant made: but, if the deed had *never be inrolled*, then it should have been the grant of A. and the confirmation of B.; because the land never passes from A. the deed being ineffectual, and void without inrollment.

Of the Days of Payment.

And these are *by* the particular *appointment of the parties* in the *deed*, or *by appointment of law* in default thereof:—and here it is true that *the law will never control the express appointment of the parties'*

(*l*) Bro. tit. Grant, 69. 73. 2 Rol. Ab. 425. a. (*m*) Co. Lit. 147. b.
(*n*) 5 Co. 7, b. Plow. 140, b. 161, b. 171, a. 289. Co. Lit. 197, a. 267, b.
(*o*) 8 Co. 154, b. Co. Lit. 147.

[*49] *where such appointment *will answer their intention:* but though there be particular days mentioned in the deed for the payment of the rent, yet if the manner of such appointment will not fully answer the design of the contract, the law in such case will *alter* or *transpose* the words of the deed; because it is the great end of the law to execute all contracts, however unwarily or inartificially framed, according to the purport, and intention of the parties, upon the whole deed: thus, for instance, if A. makes a lease to B. the sixth of August, rendering yearly the rent of 40*s.* at two terms of the year; *viz.* at Lady-day and Michaelmas, by equal portions; though, in this case, by the appointment of the parties, Lady-day being the first term mentioned, yet the first payment shall be made at Michaelmas ensuing the date of the lease; for, without such transposition, the intention of the parties could never be fulfilled;(*p*) because the rent is reserved annually, and the lessor would lose the profits of one half year, if the rent was not payable the first Michaelmas: for then the lessee must enjoy the *land, from the date of the lease to the first Michaelmas, without paying any thing; and so likewise, from the last Lady-day of the term to the expiration of it; because though the lease ended in August, yet the payment was not to be made till the Michaelmas following, before which time the lease expires.

[*50]

If a man makes a lease the first day of May, reserving rent payable quarterly; this shall be intended quarterly from the *making* of the lease; for if the beginning of the quarter should be construed to be any other day than the date of the lease,(*q*) the lessor would lose the profits of his land for some time; and consequently not have quarterly payment made during the continuance of the lease.

If a lease be made for years, provided that the lessee shall pay for it, at Michaelmas and Lady-day, 10*l.* by equal portions *during* the *term;* though this rent is *not* made payable *yearly*, the law construes it to be so; because it is payable at the two feasts *during the term, and then consequently it must be paid *yearly;* because if there be any omission of the payments any one year during the lease, it is not paid at the two feasts during the term.

[*51]

So if the rent had been payable yearly,(*r*) without saying *during* the said *term;* yet the payment must be made every year during the continuance of the lease.

If a man grants a rent of 10*l.* to another,(*s*) payable at the two usual feasts of the year; this shall be intended by *equal portions,* though not so mentioned in the deed: because where there are two several days appointed for payment, it is the most equal construction, that a moiety of the rent shall be paid at each day.

And if a lease be made, rendering rent at the two usual feasts of the year, without *specifying* what feasts in certain; the law construes such payments to be made at Michaelmas and Lady-day, because those are the usual *days appointed in contracts of this nature for payments.

[*52]

Lessee for life grants an under lease for two years, if he so long lived,

(*p*) Hob. 172. Co. Lit. 217, b. Plow. 171, 172, a. 2 Brownl. 221.
(*q*) 2 Rol. Ab. 449, 450. (*r*) Moor, 459.
(*s*) 2 Rol. Ab. 450.

reserving yearly during the term 100*l.*(*t*) at Michaelmas and Lady-day, by equal portions, or within 13 weeks after every of the said feasts; if the lessor dies after Michaelmas, and within 13 weeks, there is no rent due for the last half year: because the lessee has election in this case, either to pay the rent at Michaelmas, or any time during the 13 weeks; and if it be not paid at Michaelmas, it is then the same as if the rent had been made payable 13 weeks after Michaelmas only: and consequently the lessor dying, and the lease thereby determining before the rent became due, the lessee shall not be obliged to pay it: for the lessee shall not be obliged to make any return or retribution for a thing he has not enjoyed to the day he was to make the retribution.

But if tenant in fee makes a lease for years,(*u*) to begin at Michaelmas, rendering *100*l. per annum*, at Michaelmas and Lady-day,(*v*) or within ten days after every feast; it seems, by the [*53] better opinion, that the rent is due the *last* Michaelmas day of the term, without any regard to the 10 days: for the reservation being annual, at the two feasts, or within 10 days, it shall be construed to the end of every ten days *during the term*, as most agreeable to the design of the contract; and therefore the law rejects the ten days after the *last feast*, because the term ending at Michaelmas, there cannot be ten days after it *during the term* for payment of the rent. And this construction is the more reasonable; because, to give the lessee his election to make the last payment either at Michaelmas or ten days after, as in the former case, were to put it in his power to avoid payment of the last half year's rent: for if it were to be construed not to be due till the end of the ten days, the lessor could never oblige him to pay it; because then the term would be ended before the rent became due: but the addition of the ten days was only to *enlarge* the time of *payment*, *but not to *prevent* the payment, or to remit any part of the rent. [*54]

IV. To whom rent may be reserved or granted: and by what words the rent, being reserved, may be *continued* to those that are to have the reversion after the death of the lessor.

And here Littleton's text is to be laid down as a sure rule, *that no rent (which is properly called rent) may be reserved upon any feoffment, gift, or lease; but only to the feoffor, donor, lessor, or to their heirs,*(*w*) *and in no manner may it be reserved to any* strange *person:* and the reason of the rule is this; *because the rent is something paid by way of retribution for the land;* and therefore ought to be made to him from whom the land passes:—besides, the reservation to a stranger was prohibited to avoid the danger of *maintenance;* for, if they were allowable, persons might make reservations to powerful men, who might extort more from the tenant than was originally contracted for: and, therefore, I *presume, it was, that the *king* was excepted [*55] out of the rule,(*x*) and allowed to make the reservation of rents to a stranger; because there could be no danger of maintenance in

(*t*) 10 Co. 127. Clan's case. Cro. Jac. 310. 500. Cro. El. 380. 4 Leon. 247. Cro. El. 565. 575.
(*u*) Cro. Jac. 227. 223. Barwick v. Foster.
(*v*) Yel. 167. 1 Brownl. 220. 1 Bulst. 1.
(*w*) Lit. Sect. 346. Co. Litt. 143, b. 2 Rol. Ab. 447. Co. Lit. 47, b.
(*x*) Moor, 1. 62. Co. Lit. 143. 2 Rol. Ab. 447.

this case, there being no person so great and powerful as the king himself, who parted with the land.

If therefore A. enfeoffs B. upon condition that B. and his heirs shall render to C. and his heirs, a yearly rent of 10*l.*, and if he fails, that it shall be lawful for A. and his heirs to re-enter; this is not in the nature of any sort of rent, but a sum in *gross*, which the feoffee is obliged to pay to prevent the re-entry of the feoffor. For at common law,(*y*) before the statute of *quia emptores, &c.* it could not be good as a *rent service*, because nothing *passed* from C. for which a retribution ought to be made: —Nor can it be good by way of *rent charge*, because C. hath no remedy given him by the deed to charge the land with it, or otherwise to recover it:—Nor is it a *rent seck*, because though it should be once paid to C. and
[*56] he thereby have *seisin of it, yet he shall never have an *assize* for the recovery of it; because the penalty by the deed is a re-entry to A. and his heirs, which for ever determines it.

But if A. and C. had in this case joined in a feoffment of the land by deed,(*z*) reserving rent to them both and their heirs, and the feoffee had granted, that it should be lawful for them and their heirs to distrain for the rent, this had been a good *rent-charge* to them both: because C. being party to the deed, has a remedy by distress, for the recovery of it; and when the feoffee impowers C. to distrain on the land, such grant, as is already observed, always supposes that the distress, which is in the nature of a pledge, shall remain in the person's hands to whom it is given, until it be redeemed by the payment of the thing for which it was originally taken.

But where the husband, possessed of a term for years in his own right,(*a*) joins with his wife in an assignment of the term, reserving rent
[*57] to him and *his wife, and the survivor of them, if they shall so long live;(*b*) and if the rent be in arrear, that it shall be lawful for them and the survivor of them, and for the assignees of the survivor of them, to re-enter, but the wife never seals or delivers the deed, this rent determines by the death of the husband; for it could be no good reservation to the wife, because she had no interest in the land to part with, and therefore could have no rent service reserved to her by way of retribution for a thing she had never in her to part with: nor can this amount to a grant of a *rent charge* to her, as in the former case of the feoffment it did to E.; because here, the wife, having never sealed and delivered the deed, could be no party to it; and there does not appear to have been any clause of distress limited to the wife by this deed, as there was to C. by the deed of feoffment, and consequently it could not be a *rent charge* upon the land: nor is it good as a *rent seck* in her, because issuing out of a term for years, it must in its nature be a chattel in-
[*58] terest, for which no *assize* lies, *which is the only remedy, after seisin, for the recovery of a rent *seck:* nor would the executors of the husband be intitled to the rent, though it was limited to them and the survivor of them, and the assigns of the survivor during the term; because the reservation to the wife was evidently intended to create an interest and right in her to the rent, and therefore shall not be taken as words of *limitation*, against the original design of them.

(*y*) Lit. Sect. 345. (*z*) Co. Lit. 213.
(*a*) Cro. Car. 288, 289. Sir Wm. Jones 308, 309.
(*b*) 2 Rol. Ab. 450. Bland v. Inman, 2 Sand. 368.

If a man makes a lease for years, reserving rent to his heirs;(*c*) or makes a lease to commence after his death, reserving rent; this is rent *service* arising in the heir, not by way of any *purchase* of such rent, but as an *incident* to the *reversion* descending to the heir; and therefore may be released by the ancestor during his life, which it could not be, if it were a *new purchase* in the heir. And so it is if the rent was reserved upon a lease for life, or gift in tail; the reason is, because the reversion descends from the ancestor to such heir, and the rent service is incident to the reversion: *and the ancestor might as well contract for any new incident to arise to such reversion, as a man that hath an estate in land might grant such original charges. [*59]

But if the reservation had been made to the *son*.(*d*) though he happened afterwards to be heir, such reservation is void: for it cannot be good by way of rent service, because the son has not the reversion to which the rent is incident at the time of the lease made; and, if the son dies before the rent commences, it may go to a different person than the reversion, which belongs to the heir of the father: and such reservation cannot be good by way of *new grant*, because the word *reservation* will not import a new grant, unless it be made to the person from whom such interest moves.

If an original grant be made of a rent, to commence after the death of F. S. it is good:(*e*) for this is not like the case of lands where the *livery* must carry the freehold immediately, and where the abeyance, for want of distinguishing *where the freehold is, may be of prejudice to the rights of others; for if the freehold was to be granted *in futuro*, and a man had brought his *præcipe* against the grantor, after he had proceeded in it a considerable time, the writ might *abate* by the freehold's vesting in a stranger, by reason of a conveyance made by the grantor before the writ brought. But the grant of a rent *de novo*, is not attended with the like inconveniency; for no man can have a *precedent* right to a thing which is originally *created* by the grant inself. Yet Q. at what distance of time such charges may be allowed to commence, whether it must be not after the lives of persons in *esse;* for if they be *indefinite* they seem to have the same tendency to a *perpetuity* as any contingent remainders or executory interest: and the bare affection of a perpetuity is sufficient to damn any conveyance. [*60]

But a rent in *esse*, or already created,(*f*) cannot be granted to commence after the death of F. S. because to such rents, there may be *precedent* titles; *and therefore such grants are not good; for such freeholds, by thus being split and severed, do *hide* the person in whom the right is: and therefore the party that has right will not be able to discern against whom to bring his *præcipe* for the recovery of it. [*61]

And as there can be no reservation to a stranger during the life of the lessor; so neither can a rent be reserved after the death of the lessor to any person, who has not the reversion after his death: for as in the former case the reservation was void, because there can be no retribution or return made to him that gave not the estate; so after the death of the lessor, the rent must be reserved and paid to him who has the reversion: for

(*c*) Hob. 130. 2 Rol. Ab. 447. Lit. Sect. 346. Co. Lit. 99, b. 213, a.
(*d*) Hob. 130. 2 Rol. Ab. 447. 2 Sand. 307.
(*e*) Bro. tit. Grant 86. 8 H. 7. 3. Plow. 156. Palm. 29, 30. 2 Vent. 204.
(*f*) Bro. tit. Grant, 86. 8 Hen 7. 3. Plow. 156.

since, during the continuance of the particular estate, the reversioner loses the profits of the lands, the rent, in equity, ought to be paid to him as a compensation for that loss.

Therefore if A. covenants and grants with B.(*g*) that he shall have and enjoy black acre for six years, and B. convenants *to pay A. his heirs, executors, administrators and assigns, an annual rent during the term; this, as is said, being a good reservation of a rent, shall, upon the death of A. be paid to the heir who has the reversion, as a retribution for the profits of the land, which he cannot enjoy during the term: and the executor of A. shall never have any thing by virtue of the covenant, though it be in express words granted to A. and his executors, admisistrators, &c. So if A. makes a lease, reserving rent to him, his executors and assigns, and dies, that rent is determined;(*h*) for the executors cannot have it for the former reason, being strangers to the reversion, which is an inheritance: and therefore, they being never to enjoy the profits of the land after the expiration of the term, can never have a right to the retribution, or compensation for them.

[*62]

If a bishop leases for years, reserving rent, *proviso quod tempore vacationis dicti episcopatûs, reditus prædictus, secundum ratam temporis, solvitur* capitulo *ecclesiæ cathedralis ricti episcopatûs,* *with a clause of re-entry to the successor for nonpayment of the rent; the *chapter*, being never to come into the succession of the lands belonging to the *see*, can have no right to a return of service from the lessee.

[*63]

If there be two joint-tenants, and they make a lease by *parol* or deed *poll*, reserving rent to *one* only,(*i*) yet it shall enure to both; but if the lease had been by deed *indented*, the reservation should have been good to him only to whom it was made, and the other should have taken nothing. The reason of the difference is this; where the lease is by deed poll or parol, the rent shall follow the reversion, which is *jointly* in both lessors. And the rather, because the rent being something given the joint-tenant to whom it is reserved in retribution for the land, he ought to be seised of the rent in the same manner he is of the land demised, which is *equally* for the benefit of his companion and himself: but where the lease is by deed indented, they are *estopped* to claim the rent in any other manner than it is reserved by *the deed; because the indenture is the deed of each party, and no man shall be allowed to recede from his own solemn act.

[*64]

By what *words* the rent reserved may be continued to those who are to have the reversion after the death of the lessor.

And here first is observable the difference, between a *general* reservation without mentioning any person in certain to whom the rent shall be paid; and a *particular* reservation to the lessor, without mentioning any *other* person to whom it shall be paid:(*k*) for where the reservation is *general*, the rent shall be carried over to the person which should have succeeded in the estate, if no such lease had been made. But where the reservation is particular, as *to the lessor*, without going any further, there the rent shall determine with his death, though the lease upon

(*g*) Cro. Car. 207. (*h*) Co. Lit. 47, a. 2 Rol. Ab. 450.
(*i*) 2 Rol. Ab. 447. Co. Lit. 47, a. 1 Vent. 161, 162, 163.
(*k*) Co. Lit. 47, a. 2 Rol. Ab. 450, 289. 2 Sand. 369. Dyer 45. Hard. 95. Latch, 101. 1 Vent. 162. Dyer 45.

which it is reserved be still continuing. As for instance A. makes a lease for years, reserving a certain rent, *without saying* to the *lessor or* **his heirs;* yet this general reservation shall [*65] carry the rent, not only to the lessor, but even to his heirs that succeed in the reversion, because the rent is reserved as a retribution or compensation for the land demised; and therefore ought, from the nature of the contract to be of equal duration with the demise:—But if A. had made a lease, reserving a certain rent to himself, this rent shall determine by his death; because, having reserved it expressly to himself, he has thereby determined how long the reservation shall continue: and therefore it shall never be carried farther than that period of time to which the lessor himself has fixed it.

So if the lease had been made by A. yielding and paying to him and his *assigns* yearly the rent of 10*s.* this rent shall likewise determine by his death, and his heir shall never have it; because there are no words to carry it to the heir, who is to have the reversion;(*l*) and the lessor having expressly limited it to himself, has thereby determined it to his own life.

*So if the reservation had been made to *the lessor and his executors,* or to *him, his executors or assigns,* in these [*66] cases the rent determines with the life of the lessor:(*m*) for the executors cannot take the rent, because if it be continued beyond the life of the lessor, it must be carried over to him that must succeed in the estate, and that is the heir at law:—the heir cannot take, because there are no words in the deed to carry it to him.

So if a man possessed of a term of 100 years,(*n*) makes a lease for 50 years, reserving rent to *him and his heirs;* this rent determines at his death:—for the heir cannot have it because he cannot succeed in the estate, being a chattel interest, to which the rent, if it continues after the life of the lessor, must belong:—and the executors cannot have it, because there are no words to carry it to them.

But if a man seised of lands in fee makes a lease for years, reserving rent to *him and his assigns during the term;* *this reservation shall not determine by the death of the lessor, but the [*67] rent shall go to his heir: for though there be no mention of his heirs in the reservation, yet there are words which evidently declare the intention of the lessor to be, that the payment of the rent shall be of equal duration with the lease,(*o*) the lessor having expressly provided that it shall be paid *during the term;* consequently the rent must be carried over to the heir, who comes under the inheritance after the death of the lessor, and would have succeeded in the possession of the estate if no lease had been made. And, if the lessor assigns over his reversion, the assignee shall have the rent as incident to it, because the rent is to continue during the term; therefore the rent must follow the reversion, since the lessor made no particular disposition of it separate from the reversion.

If a lease be made for years, reserving rent *during the term* to the

(*l*) Latch, 274. 1 Vent. 162, 163. 2 Rol. Ab. 450. Co. Lit. 47. Cro. Car. 290. 2 Lev. 13.

(*m*) 2 Rol. Ab. 450. 47, a. (*n*) 1 Vent. 161.

(*o*) Latch, 99, 100, 101. 1 Vent. 163. 2 Rol. Ab. 451. Same case ill reported to the Con.'

lessor, his executors and assigns,(*p*) this, by the judgment of Richmond v. Butcher's case, determined upon the death *of the lessor, and did not go to the heir: but this judgment has since been overthrown, by the authority of the case of Sacheverell v. Frogate; because, the reservation being to the lessor and his assigns *during the term;* (for the words executors, &c. are void, the lessor having the inheritance,) such express words evidently discover the intention of the contract, and that the lessee agreed and bound himself to the payment of the rent during the continuance of the demise.

[*68]

So, for the same reason,(*q*) if a termor for 50 years leases for 25 years, reserving rent to *him and his heirs during the term;* the executors shall have the rent after the death of the lessor.

If A. grants a rent charge to B. for 40 years,(*r*) with a clause of distress to B. and his heirs during the term, the executors of B. may distrain for it during the term: for the distress is expressly given during the term, and therefore must belong to the executor, who has a right to the rent charge, being a chattel interest.

*If A. makes a lease, reserving rent to *him* OR *his heirs,* this is a good reservation during the life of A. but void to his heirs: because the reservation being to him *or* his heirs, in the *disjunctive,* both cannot take it;(*s*) and the word *heirs* cannot be a word of limitation, because if they are to take at all, they must take *originally;* for if the rent vests in the lessor, it cannot afterwards go to the heirs, for that would be contrary to the words of the reservation, which limited the rent either to go to the lessor *or* his heirs, but not to both of them.

[*69]

But it has been adjudged, that where an abbot made a lease, rendering rent to *him* OR *his successors during the term,* that this reservation was good to the successor after the death of the lessor; because here by the express words of the deed, the rent is made payable during the continuance of the term; and therefore, as *incident* to the reversion,(*t*) must go in succession with the inheritance; and for this reason the successor of the abbot, or assignee of the *reversion, must necessarily have it; for the rent being but a retribution for the land, none can have a right to it, but those who would have succeeded in the estate of the land for which the retribution is given, if it had never been leased.

[*70]

If tenant in tail *special* leases for years,(*u*) reserving rent to *him, his heirs and assigns;* this rent shall go with the reversion to the special heir in tail, though it be reserved to the heirs general: for the word *heir* shall be taken in what sense shall best answer the nature of the contract; which is, that those who would have succeeded in the estate if the lease had never been made, shall enjoy the rent, as the retribution given them for want of the land during the lease.

If there be tenant for life with several remainders over,(*v*) so settled by limitation of uses, with a power to tenant for life to make leases, who makes a lease reserving rent to *him, his heirs and assigns;* this is a good

(*p*) Cro. Eliz. 217. 1 Vent. 161, 162, 163. 2 Saund. 367. Raym. 213. 2 Lev. 13. 5 Co. 112, a.
(*q*) 1 Vent. 162.
(*r*) Cro. Eliz. 644. Darrel v. Wilson.
(*s*) Co. Lit. 214. Vent. 163. 5 Co. 112.
(*t*) 5 Co. 111, 112. Maliorie's case. Cro. Eliz. 805. 832. 1 Vent. 148, 163.
(*u*) Hard. 89 to 96. 1 Vent. 162.
(*v*) 8 Co. 69, b. 70, 71.

reservation, and shall go to those in *remainder: for when [*71] the tenant for life makes a lease pursuant to such power given him by the settlement, such lessee derives his estate out of the inheritance, which before the settlement was in the tenant for life; and the settlement being by such construction of law subsequent to the estate of the lessee, those in remainder to the tenant for life are his assignees, to whom the rent by the express words of the lease, is reserved and limited after the death of the tenant for life.

So if the reservation had been in this case to the *lessor*,(w) *and to every person to whom the reversion and inheritance of the land belongs during the term;* this is a good reservation to those in remainder; and the law, in such a case, will distribute the rent according to the several interests under the settlement: but Lord Coke says, that the surest way is, for tenant for life to reserve the rent *annually during the term;* and then the law disposes of it as incident to the reversion.

*If a man seised of lands of the *part* of the *mother*,(x) [*72] makes a lease for life, or gift in tail, reserving rent to *him and his heirs;* this rent shall go, with the reversion, to the heirs of the part of the mother: because the nature of the contract is such, that the retribution should go to those that lose the profit of the lands during the lease or gift.

But if he had made a *feoffment in fee*,(y) reserving rent to *him and his heirs;* the rent shall go to the heir of the *part* of the *father:* because here is an intire disposition of the land, and the rent is in the nature of a new purchase, coming in to the family from the grant of the feoffee; and therefore the blood of the father shall be preferred.

*V. Of the several *remedies for the recovery of rents:* but [*73] before this is shown, it will be necessary to take notice of some things that must be done by the persons that are to pursue these remedies before they can recover by them. And here is to be considered; 1st. In what cases a *demand* is necessary. 2dly. At what *place* and *time* such demand must be made.

I. *In what cases a demand is necessary.*

And here the material difference is observable between a remedy by *re-entry*, and a remedy by *distress*, for the non-payment of rent.(z) For where the remedy is by way of *re-entry* for non-payment, there must be an *actual demand* made *previous* to the entry, otherwise it is *tortious:* because a condition of re-entry is in *derogation* of the *grant*, and the estate at law, being once defeated, is not to be restored *by any subsequent payment; and it is presumed, that the [*74] tenant is there residing on the premises, in order to pay the rent, for the preservation of his estate, unless the contrary appears by the lessor being there to demand it: and, therefore, unless there be a *demand* made, and the tenant thereby, contrary to the presumption, appears not to be upon the land ready to pay the rent, the law will not allow the lessor the benefit of *re-entry*, to defeat the tenant's estate, without a wilful default in him;

(w) 8 Co. 71, b. (x) Co. Lit. 12, b. (y) Co. Lit. 12, b.
(z) Co. Lit. 201, b. Hob. 207. 331. Dy. 51, b. Plow. 70. Vaug. 32. 7 Co. 28, b. Co. Lit. 202.

which cannot appear without a *demand* hath *actually* been made upon the land.

So it is, if there be a *nomine pœnæ* given to the lessor for non-payment, the lessor must *demand* the rent, before he can be entitled to the *penalty:*(*a*) or if the clause had been, that if the rent were behind, that the estate of the lessee should cease and be void; in these cases there must be an *actual demand* made, because the presumption is, that the lessee is attendant on the land to save his penalty, and preserve his estate; and therefore shall not be *punished, without a wilful default: and that cannot be made appear, without a demand be proved, and that it was not answered. And the demand in these cases must be made on the day *prefixed* for the payment, and alleged expressly, to have been made in the *pleading*.

[*75]

But where the remedy for recovery of the rent is by *distress*, there needs no *demand previous* to the distress; though the deed says "that if the rent be behind, being lawfully demanded, that the lessor may distrain:" but the lessor notwithstanding such clause, may distrain when the rent becomes due. So it is if A. has a rent charge, and if it be behind, being lawfully demanded, that then A. shall distrain, he may nevertheless distrain without any *previous demand:* because this remedy is not in *destruction* of the estate; for the distress is only a *pledge* for the payment of it; and the very *taking* of a distress is a *legal demand* to the tenant to pay the rent, which is all that was required by the deed: and the tenant is not injured by the taking of *the distress; because upon the *tender* of the rent, the pledges are immediately restored, or a writ of *detinue* lies, after the *quantum* of the rent has been settled in *replevin*. Whereas in the case of re-entry, or of the penalty, the tenant is really injured, either by the loss of his estate, or the payment of a greater sum than the rent, which cannot be restored upon the payment of the rent: and therefore he shall not be punished in such cases, without a wilful default in him, which cannot otherwise appear, than by the proof of a demand not answered by the tenant.

[*76]

But this general distinction must be understood with these restrictions:—First, that if the *king* makes a lease, reserving rent, with a clause of re-entry for non-payment,(*b*) the king is not obliged to make any *demand* previous to his re-entry; but the tenant is obliged to pay the rent, for the preservation of his estate: because it is beneath the royal dignity of the crown to attend a subject to demand the rent; but the *law*, for the support of that *dignity, obliges every private person to attend the king, with the services due to him.

[*77]

But this exception is not to be extended to the *ducthy* lands, though they be in the hands of the king; for the king, in this case, must make a demand before he can enter into such lands. But this is by the statute of 1 Hen. 4, which provides, that when the dutchy lands come to the king,(*c*) they shall not be under such government and regulation as the demesnes and possessions belonging to the crown are: for the act says, *quod taliter modo, et per tales officiarios vel ministros gubernentur, etsi ad culmen dignitatis regiæ assumpt' minime fuissent:* so that

(*a*) Hut. 114. Hob. 207. 331. Hanson v. Norclif. 7 Co. 28, b. Hut. 42. Hob. 82. 133.

(*b*) 5 Co. 56. 4 Co. 73. Latch, 28. Moor, 152.

(*c*) Moor, 149 to 154.

by this act they are to be considered as if they were in the hands of a subject; and consequently a demand necessary. But if the king, in cases where he *need not* make a demand, *assigns* over the reversion, the *patentee* cannot enter for non-payment without a demand previous: because the privilege is *inseparably* annexed to the *person* of the knig, for the support of his royal dignity;(*d*) *and therefore shall not be extended to cases where the king is no way concerned. [*78]

Secondly; another exception is, where the rent is payable at a *place* off the land, with a clause, that if the rent be behind, being lawfully demanded at the *place* off the land;—or where the clause is, that if the rent be behind, being lawfully demanded of the *person* that is to pay it, that then he may distrain: in these cases, though the remedy be by distress only, yet the grantee cannot distrain without a *previous demand;* because here the *distress* and the *demand* being not one *complicated*, but *different* acts, to be performed at different *places* and *times*, the demand must be previous to the distress; for the distress is an act of agreement between the parties, and not of common right, and therefore must be used in the manner that it is given; for *cujus est dare ejus est disponere.*

When a distress is given by *law*, it appoints *where* it shall be *taken*, but requires no demand previous to it; *because it considers the distress itself as a *demand:* and if it were otherwise, the tenant might elude his lord, by driving off the beasts. [*79] But where the distress is given by the *agreement* of the parties, and the place which the law appoints is altered by the agreement of the parties, then a demand is necessary to be made to intitle to the distress; because both the distress and the demand arise from the agreement of the parties, and by consequence the demand must be previous, according to the stipulation.

But where the clause is no more, than that if the rent be behind, being lawfully demanded,(*e*) without saying at any *place* off the land, or of the *person* of the grantor, that then the grantee may distrain, there needs no *actual* demand: because here the distress and demand is but one *complicated act*, the one included in the other, and all done at one time and place, *viz.* upon the land; for the distress is in itself a lawful demand, and therefore there needs no actual demand previous to it: because all that was required by the deed was a lawful *demand, which the distress in its own nature is. [*80]

There seems formerly to have been another exception admitted, that where the remedy was by way of *entry for non-payment*, that yet there needed no demand, if the rent were made payable at any *place* off the land; because they looked upon the money, payable off the land, to be in the nature of a sum in *gross*, which the tenant had at his own peril undertaken to pay. But this opinion has been entirely exploded, for the place of payment does not alter or change the nature of the service; but it remains a rent as much as if it had been made payable upon the land;(*f*) and therefore the presumption is, that the tenant was there to pay it, unless it be overthrown by the proof of a demand: and without such a demand, and neglect, or refusal thereupon, there is no injury done to the

(*d*) 4 Co. 73, a. Moor, 404. Cro. Eliz. 462.
(*e*) 2 Rol. Ab. 426. Hob. 208. Licet Dy. al con. 348.
(*f*) Plow. 70. Kidwelly's case. 4 Co. 73, a. Moor, 408. 598. Cro. Eliz. 415. 535, 536.

lessor; and consequently the estate of the lessee shall not be defeated or determined.

But where the power of re-entry is given to the lessor for non-payment of *rent, *without any further demand;* here it seems that the lessee has undertaken to pay it whether it be demanded or not, and there can be no presumption in this case in his favour, because, by dispensing with the demand, he has put himself under the necessity of making an actual proof that he was ready to tender and pay the rent.

[*81]

Another exception, where the remedy is by distress, is, that where the tenant was ready on the land to pay the rent at the day, and made a tender of it, there it seems there must be a demand previous to the distress; because, where the tenant has shown himself ready on the day by the tender, he has done all that can in reason be required of him: for it would put the tenant to endless trouble,(*g*) to oblige him every day to make a tender, it being altogether uncertain when the lessor shall come for his rent, when he has omitted the day which he himself appointed by the lease for payment and receipt thereof; as the lessee must expect the lessor, and be ready to pay *it at the day appointed for payment of it, or else the lessor may distrain for it without any demand: so, where the lessor has *lapsed* the day of payment, and was not on the land to receive the rent, he must give the tenant notice to pay it before he can distrain for it; because the tenant shall be put to no trouble where it appears that he has omitted nothing on his part.

[*82]

And where the tender was made by the tenant only *on the land* at the day,(*h*) there a demand *on the land* is sufficient to justify a distress after the day; because the demand is of equal notoriety with the tender: and, by a parity of reason, the tenant ought to take notice of such demand, as well as the lessor of the tender on the land.

But if the tenant had tendered the rent on the day to the person of the lessor,(*i*) and he refused it; it seems, by the better opinion, that the lessor cannot distrain for that rent without a demand of the *person* of the tenant; because the demand ought to be equally *notorious to the tenant, as the tender was to the lord.

[*83]

So if the service by which the tenant holds be *personal*,(*k*) as by *homage* or *fealty*, the demand must be of the person of the tenant: because this service is only performable by the very person of the tenant; and therefore a demand where he is not, would be improper. Again, if the rent be *seck*, and the tenant be ready, at the last instant of the day of payment,(*l*) to pay the rent, and the grantee is not there to receive it, he must afterwards demand it of the person of the tenant, on the land before he can have his *assize:* because the tenant, by the tender at the day, has done all that was required on his part; and if the grantee might have his *assize*, after such tender on the day, without a demand of the person, the tenant might be made a disseisor, and damages for the disseisin laid upon him, without any wilful default in him: but in the case of a rent charge, after such tender of the tenant's on the land, the grantee may demand

(*g*) Hob. 207. 2 Rol. Ab. 427.
(*h*) Hob. 207.
(*i*) Hob. 207. 2 Rol. Ab. 427.
(*k*) Hob. 207. Hut.
(*l*) 7 Co. 29, a. Hob. 207. 2 Rol. Ab. 427, 428. Cro. Car. 508.

afterwards the *rent upon the land; because he has his remedy by distress, which is no more than a pledge for the rent, and this not being to be found and taken off the land, the grantee need only to demand his rent where he can find his remedy, which is upon the land: but in this case, if the grantee cannot find the tenant on the land to demand the rent, he may, at the next feast on which the rent is payable, demand all the arrears on the land; and if the tenant be not there to pay it, he has failed of his duty, and is guilty of a wilful default, which amounts to a denial; and that denial being a *disseisin* of the rent, the grantee may have his *assize*, and by that shall recover all the arrears. [*84]

But if there has been neither a tender of the tenant, nor a demand of the grantee, on the day, there the grantee may afterwards demand the rent on the land: because, the tenant, having omitted to do his duty by a tender on the day, is still obliged to answer the legal demand of the grantee, which is well made upon the *land; because the rent issues thereout: for when there is no tender on the day of payment, the rent is due,(*m*) and payable every day afterwards, and therefore a demand in the same manner as the law requires is sufficient; and consequently the non-payment, after a demand on the land, is a denial and disseisin for which the grantee may have his assize. [*85]

If a lease be made reserving rent, and a *bond* is given for performance of *covenants*, and *payment* of the *rent*, the lessor may sue the bond without demanding the rent; for the bond being only a *collateral* security for the rent, makes no alteration in the nature of it, but it must still be paid in the same manner, and at the *same time* and *place*, as if there were no bond given;(*n*) and therefore is subject to the former rule and distinction as to the demand.

If there be *several things* demised in one lease, with *several* reservations, with a clause, that if the several yearly rents reserved be behind or unpaid, in **part* or in *all*, by the space of one month after any of the days at which the same ought to be paid, that then it shall be lawful for the lessor, into such of the premises,(*o*) whereupon such rents being behind is or are reserved, to re-enter; these are in the nature of *distinct* demises and *several reservations*, and consequently there must be *distinct* demands on *each* demise, to defeat the whole estate demised. [*86]

Secondly, as to the *necessity of the demand of the rent;* there is a difference between a *condition* and a *limitation:* for instance; if tenant for life (as the case was by marriage settlement,) with power to make leases for 21 years, *so long as the lessee, his executors or assigns shall duly pay the rent reserved*, makes a lease pursuant to the power, the tenant at his peril, is obliged to pay the rent, without any demand of the lessor;(*p*) because the estate is *limited* to continue only so long as the rent is paid; and therefore, for the non-performance according to the limitation, *the estate must determine: as if an estate be made to a woman *dum sola fuerit*, this word *dum* is a word of limitation which determines her estate upon her marriage.(*q*) *Note* [*87]

(*m*) 7 Co. 29, a. 2 Rol. Ab. 427. Lit. Sect. 233.
(*n*) Hob. 8. Cro. Car. 76. Chapman v. Chapman, Cro. Eliz. 332.
(*o*) Vaugh. 71, 72.
(*p*) Vaugh. 31, 32. Triftraine v. Countess of Baltinglass.
(*q*) Hob. 331. Bro. Ab. 429.

that it is the better way for the lessor to have a clause of *re-entry* for non-payment of the rent, than a clause for the lease to be *void;* because there is no re-entry previous to determine an estate already void in itself: yet even in this case, if the lessor forbears to make an actual demand when the rent is in arrear, he may recover it by an action of *debt,* or *distress,* and so continue the lease; because those remedies not being in *defeasance* of the grant, the lessor may pursue them without an actual demand, as is already observed.

II. *Of the place and time, where and when, the rent must be demanded.*

And here again we must observe the difference between remedy by *re-entry* and *distress.* For where the rent is reserved upon condition, [*88] that if it *be behind, the lessor may enter; in such case the demand must be upon the most *notorious* place on the land:(r) and therefore, if there be a *house* on the land, the demand must be made at the *fore door* thereof, because the tenant is presumed to be there residing;(s) and the demand being required to give notice to the tenant, that he may not be turned out of his possession without a wilful default; such demand ought to be in a place where that end and intention will be best answered.

If a rent *seck* be granted out of A. payable at B. the grantee may demand it at A.; and if the tenant be not there to pay it, this is a disseisin, for which the grantee may have his *assize;* and a demand at B. had been likewise good;(t) because that, by the express appointment of the parties, was the place where the rent was made payable; and therefore a fit place to demand it.

But a demand of the *person* of the tenant is not sufficient *off* the land, because the demand is required to be in order to an immediate payment; [*89] but *no person is presumed to carry his wealth about him,(u) for that is reasonably supposed to be at the place of his habitation, or upon the land from which it is gathered; and therefore the demand of the person *off* the land, being not sufficient to answer the intention of the demand, is useless and insignificant.

If the *Queen* makes a lease reserving rent, the tenant must pay it without demand, as is said, either to her receiver for that purpose, or at the receipt of the exchequer, as well as if, by the words of the lease, the rent had been made payable at her exchequer, or into the hands of her receiver.(v) But if the Queen grants the reversion, the *patentee* must demand the rent upon the land; because that is the place appointed by law, for the reasons already given, for a common person to demand the rent.

If it were reserved payable at the Church of S. *or* D., upon condition;(w) it ought to be demanded at both places: because the lessee has

(r) Co. Lit. 153, a. 201, b. 2 Rol. Ab. 428.
(s) Dalison 59, a. Co. Lit. 201, b. And. 27. 3 Leon. 4. Licet Cro. Eliz. 15, alcon'.
(t) Cro. Ja. 507, 508. Smith v. Smith, Cro. Eliz. 334. Ben. and Dal. 59. 2 Rol. Ab. 428.
(u) Cro. Car. 521. Co. Lit. 153. Lit. Sect. 233.
(v) 4 Co. 73. Co. Lit. 201, b. Cro. Eliz. 462. Moor 404.
(w) 2 Rol. Ab. 428.

his election to *pay it at either place: and therefore to take advantage of the condition, the lessor must demand it in such place where, by his own agreement, he has permitted the enant to pay it. [*90]

So if it had been to be demanded *at* or *in* the Church of D.;(*x*) it ought, for the same reason, to be demanded *within* and *without* the church.

If a lease be made of two *barns* rendering rent,(*y*) with a condition of re-entry for non-payment, the lessee tenders the rent at one barn, and the lessor demands it at the other, yet the lessor cannot re-enter; because one barn being as *notorious*, and consequently as proper a place as the other for the payment, it is presumed, that the lessee was in the proper place for payment, unless the presumption be overthrown by a demand: and therefore since the demand was not made at both places, *viz.* at both barns, there is nothing to destroy the presumption that the tenant was not in the *proper place* ready to pay to save the condition; and if the lessor did not demand it at the proper *place, he shall not take advantage of the condition. [*91]

Of the Time for Payment.

The time for payment and consequently for the demand, is such a convenient time,(*z*) before the *sun-setting* of the *last day*, as will be sufficient to have the money counted: but if the tenant meet the lessor on the land at any time on the last day of payment, and tender the rent, that is a sufficient tender, because the money is to be paid, *indefinitely*, on that day; and therefore a tender on the day is sufficient.

If a lease be made, reserving rent,(*a*) upon condition that if the rent were behind at the day, and ten days after, being in the *mean while* demanded, and no distress to be found upon the land, that the lessor may re-enter; if the rent be behind at the day, and ten days after, and a sufficient distress be upon the land till the afternoon of the tenth day, and then the lessee takes away his cattle, and the lessor demands *the rent, at the last hour of the day, and the lessee did not pay it, nor was there any distress upon the land, yet the lessor could not enter, because he made no demand in the *mean time*, between the day of payment, and the ten days, which by the clause he was obliged to do. [*92]

Of the remedies for the recovery of Rent.

The remedies for the recovery of rent are either by the *provision* of the *law;* or by the *appointment* of the *parties.*

The principal *remedy* which the *law* hath appointed for the recovery of a *rent service* is a *distress;* and this we have already observed to have been borrowed from the civil law: for, by the ancient feudal law, the non-performance of the service was a forfeiture of the feud; and when the severity of that law came to be mitigated, they allowed, that all the *inducta et illata* might be seised as pledges, to answer the services reserved *upon the feudal contract: and therefore this remedy by distress was allowed for the recovery of the rent service [*93]

(*x*) 2 Rol. Ab. 428. (*y*) Dy. in Margin, 329.
(*z*) Co. Lit. 202, a. 2 Rol. Ab. 408. Dalison 114.
(*a*) Cro. Eliz. 63. Wooster v. Stone.

due on a lease at will, as well as upon a lease for years,(*b*) for life, or a gift in tail: because the feud itself being originally granted at will, the forfeiture for non-payment must, with more reason, have been extended to such precarious estates, which the lord might have determined by his pleasure, without any wilful default in the tenant.

Another remedy which the law gives for the recovery of rents, is the action of *debt*, for rent reserved upon a lease for years; but this extended not to *freehold* rents, and the reason is this:—Actions of debt were given for rents reserved upon terms for years; for that such terms being of short continuance, it was not necessary that the lessor should follow the chattels of his tenant wherever they went, or wherever he should remove them: but when the rents were reserved upon the *durable* estate of the
[*94] feud, the feud *itself, and the chattels thereupon, were pledged upon it to answer the rent, and the lord had his *cessavit* to recover the land itself. And hence it is, that if the durable estate of the feud determines, as if the lessee for life dies, the lessor may have an action of *debt* for the arrears; because the land is no longer a security for the rent, and therefore the chattels of the tenant(*c*) were liable to satisfy the arrears in an action of debt, wherever the tenant removed them.

And so it was in case of a *rent charge;*(*d*) for if a man were seised of it in fee, and it was in arrear, he could have no action of debt for the arrears: and if he died, his heir could not have any *real* action for the arrears, for that is proper for the recovery of the possession, which is still in him; nor could he have a *personal* action for the arrears in the life of the ancestor at the same time, for it could not be supposed to be both a *real* and *personal* thing: for this reason also, the executor (who
[*95] is intitled to the personal estate) could not have an action for the *arrears; because the executor could not intitle himself by virtue of the contract that created the rent, since the heir was constituted representative by the contract; and by consequence that representation excluded all other persons from taking any benefit as representative, who did not come under that character.

But these inconveniencies and mischiefs are now remedied. For now, by the stat. 8 *Annæ*, it is provided, "That whereas no action of debt lies against tenant for life or lives for any arrears of rents, during the continuance of such estate for life or lives: be it enacted, that from the first day of May 1710, it shall be lawful for any person or persons having any rent in arrear, or due upon any lease or demise for life or lives, to bring an action or actions of debt for such arrears of rent, in the same manner as they might have done, in case such rent were due, and reserved upon a lease for years."

[*96] *And by the 32 of Hen. 8, the executors of a man seised either of a *rent charge*, *rent seck* or *rent service*, either in fee-simple or in tail, have now a *double* remedy given them for such arrears, either by action of *debt* or *distress:* the action of debt not only lies against the tenant, that ought to have paid the rent, but against his executors and administrators;—The distress runs with the land,(*e*) as

(*b*) Lit. Sect. 72. Co. Lit. 57.
(*c*) Co. Lit. 62. a.
(*d*) Co. Lit. 162. a. 4 Co. 49. a.
(*e*) Co. Lit. 162.

long as it continues in the possession of the tenant that suffered the rent to run in arrear, or of any other person claiming by or from him:—And therefore if a man grants a *rent charge* in fee,(*f*) and afterwards makes a feoffment of the land out of which it issues, and the feoffee makes a lease at *will*, the executors of the grantee may distrain the tenant at *will* for any arrears that became due in the life of the grantor; because such tenant claims from the grantor: and so every feoffee of the first feoffee *in infinitum* claiming immediately from the grantor.

So if the tenant makes a gift in tail,(*g*) and the donee dies, the issue is *chargeable with the arrears of rent; for though he claims by descent *per formam doni*, yet it is by virtue of the gift made by the tenant. [*97]

But if tenant in tail makes a feoffment in fee,(*h*) and dies, and the *discontinuee* charges the land with a rent in fee, and then enfeoffs the issue in tail within age, so as he is *remitted*, the issue is chargeable with none of the arrears; because being *remitted* by the feoffment to the old estate tail, he cannot claim under the continuance, but from the first donor.

So it is if the tenant dies without heirs,(*i*) so that the tenancy *escheats* to the lord, he shall not be chargeable with any arrears of a *rent charge* incurred in the lifetime of the tenant; because he claims by the original infudation, which being prior to any right the tenant had, the lord when he comes in by escheat cannot be said to claim by or from the tenant. For the further explanation of this act of the 32 Hen. 8, see title Executors under what *actions they may have*.

*But before these acts,(*k*) if there had been tenant for life of a rent, and he died, the rent being in arrear, his executors, by the common law, might have an action of debt for the arrears; for the executor, representing the person of the testator, succeeds in all his personal rights: and when the rent is in arrear at his death, it is no more than a single personal duty distinct and separate from the real estate, for which there can be no remedy by real action, which recovers freehold, of which the possessor was disseised: But the arrears of rent being no freehold, but a perfect chattel, or single duty, were recoverable by the executors, as all other personal things; and though the freehold, determined by the death of tenant for life, yet they did not construe such duties to cease, because there were no words in the contracts to found such a construction upon; for the contract gave him the entire rent during life, and the act of God did not take it away. [*98]

*If tenant *pur auter vie*, or tenant for years, held over, yet the lessor could not distrain them for rent that became due before the determination of their respective leases, though they continued in the possession of the land afterwards; for when the lease was determined, the lessor could not *avow* on them as his tenants claiming under a lease which was ended. To remedy this, it is provided by the said act of the eighth of Queen Anne,—That "whereas tenants *pur auter vie*, and lessees for years, or at will, frequently held over the tenements to them demised, after the determination of such, or any other leases, and no distress can by law be made for any arrears of rent that grew due on [*99]

(*f*) 4 Co. 50. 1 And. 178. 4 Lev. 115, 116.
(*g*) 4 Co. 50. b.
(*h*) 4 Co. 50. b.
(*i*) Co. Lit. 162. b.
(*k*) Co. Lit. 162, a.

such respective leases before the determination thereof;—It is hereby further enacted, by the authority aforesaid, that from and after the first day of May 1710, it shall and may be lawful for any person or persons having any rent in arrear, or due upon a lease for life or lives, or for years, or at will, ended or determined, *to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined: Provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

[*100]

The next remedy the law has provided is the writ of *assize:* the nature of this writ will be explained more at large in another place; all that seems necessary to be said of it here is, that it is a remedy which the law hath appointed for the *restitution* of the freehold which is *unjustly* with-held and taken away: and therefore, for the better inquiry in what cases an assize lies, we must see how many ways a man may be *disseised* of a rent.

Now this seems plain, that if I be deprived of the means by which I am to bring any thing into my possession, I may, *in all reasonable construction, be said to be deprived of the thing itself, since without that use of those means I can never enjoy the thing itself: from whence we may gather these conclusions:

[*101]

1st, That if the tenant of the land *inclose* it *so* that the lord cannot come on it to distrain, this is a *disseisin*, for which the lord may have his *assize;*(*l*) because the distress being the means by which the lord is to get the actual possession of the rent, the inclosure which hinders him from the distress, in consequence deprives or dispossesses him of the rent; and the *inclosure* for the same reason is a disseisin of a *rent charge.*

Inclosure is likewise a disseisin of a *rent seck*, but not because the grantee is thereby deprived of any distress, for that remedy the grantee has not; but because, by the inclosures he is *hindered* from coming on the land to demand the rent: for since the demand on the land on the day, and non-payment by the tenant, is a disseisin of the rent, if the tenant prevents the *legal demand of the grantee, by hindering him from coming on the land to make it, he has deprived him of the only means he had of coming at his rent; and consequently has disseised him of it: and this construction is the more reasonable, because the presumption is the more reasonable and strong, that the tenant would not pay it on demand, when he himself prevented the demand.

[*102]

2ndly, If there be no inclosures, yet if the lord comes upon the land, and the tenant *hinders him to distrain;*—or if the lord having taken the distress, the distress is *rescued* by the tenant;—these are *disseisins* of the *rent service* and *rent charge:*(*m*) for where the distress is rescued, the lord is equally deprived of the means, as if he had been kept off the land by inclosures, or hindered to distrain when he came upon the land: because the design of the distress is, by the pledges to oblige the tenant to pay the rent; but that tie or obligation ceases as much when the ten-

(*l*) Lit. sect. 207, 208. (*m*) Lit. sect. 337.

ant hath recovered his beasts without payment of the rent, as if they *never had been taken: so for the same reason it [*103] is in the case of a *rent charge.* But these are no disseisins of a *rent seck*, because the grantee of a rent seck cannot distrain for that, and consequently cannot be deprived of those means he has not pretensions to, either from the law, or the act of the party.

But the rent must be *due*, or the resistance or rescue of the tenant, can be no disseisin; because no man can be said to be deprived or disseised of a thing, he has no right to. Besides, the using of the distress before the rent becomes due, is equally unlawful, as if I used a remedy I had no right to; and consequently the tenant is not blameable for the preventing an unlawful action.

So, if the rent had been due when the lord came to distrain, and the tenant had *tendered* the rent, and notwithstanding the lord distrained; —or if the distress had been taken in the *highway*, within the lord's fee, and the tenant had made no tender;—yet in either of these cases the tenant may *rescue, without the guilt of a disseisin: because in [*104] the first case, the distress *after the tender* was unlawful, for he had no right to those pledges to inforce the payment of a debt which was offered to be paid;—And the distress in the *highway* was unlawful, because prohibited by the statute, that being a place privileged for the encouragement of commerce;—and consequently, the rescue cannot be said to be a depriving the lord of means which he had no right to make use of: and so it is in the case of every unlawful distress.

3rdly, *Replevin* is a disseisin of a *rent service* or *rent charge:* for if the rent be in arrear, and the distress be lawfully taken, the *replevin*, which obliges the return of the distress or pledges,(*n*) though under the colour of a legal process, is equally injurious to the person distraining, as an open rescue: and he may have a return of the beasts or pledges, as well upon a writ of *rescue*, as upon his *avowry*, but both equally disturb him of the means whereby he is to come at his rent.

*4thly, *Counterpleading* of the plaintiff's title, *vouching a record*, and failing thereof, are disseisins of a *rent ser-* [*105] *vice* or *rent charge:* for when the tenant fails in these defences,(*o*) they can in truth be looked upon no other wise than as affected delays, made use of in a colourable way to avoid the payment of rent.

5thly, *Denial* is a disseisin of a *rent charge* and *rent seck*, but not of a *rent service;* and the reason of the difference is this: because in the case of a *rent service* there is *homage*, or at least *fealty* attending of it, which the tenant hath sworn, and the lord hath accepted of his tenant; and therefore the mere act of *denial* of the tenant, only amounts to a denial to hold upon such terms, but does not totally deny to hold of him: wherefore the lord is not put out of possession of the tenure, and by consequence, there is no disseisin. But in the case of a *rent charge*, or *rent seck*, there is no other obligation between the grantor and grantee, but merely to payment; *therefore, the *denial* of such payment [*106] is disseising him of the whole: and though the grantee may have access to the land for a distress, notwithstanding the denial; yet such distress is only taking of pledges, which are subject to a replevin;

(*n*) Lit. sect. 237, 238. (*o*) Co. Lit. 160, b. 161, b.

and such *denial* shows an original intention to controvert the being of the rent, and therefore is a disseisin of the grantee.

This writ of assize *restores the party to the actual seisin of the freehold;* for so are the words of the writ "*facias tenementum illud resesiri &c.*:" and consequently, the party that brings this writ must found it upon an *actual seisin* of which he has been *divested;* for otherwise this remedy is not commensurate to his case: and therefore, here it is farther necessary to inquire, *what shall be a sufficient* seisin *to ground an assize upon.*

And in the first place it is observable, that there is a difference between the *seisin* required to intitle the party to his *distress* and *avowry*, and the *seisin* to ground the *assize* upon.

[*107] *For instance, if there be lord and tenant, by homage, fealty, and suit of court, and the tenant does fealty to his lord, this is a sufficient seisin to enable him to distrain for the other services: because the tenant,(*p*) by his oath of fealty, having engaged himself to the performance of the services, if he omits to do them, contrary to his solemn oath, it is but reasonable that he should be subject to some penalty, for such wilful omission: wherefore the law has allowed the lord in such cases to take pledges of the tenant for the performance of the services, which he hath undertaken by his oath to do; and these pledges or distress, being a *pain* upon the tenant, to oblige him to an actual return or payment of the services, it would be absurd to say, that the lord should not have this remedy by distress, till he had been ones actually seised of them: for that would be to put it in the power of the tenant, whether ever he would pay them or not; since he could not be compelled to it, unless he once willingly gave the lord seisin of them.

[*108] *But there must be an *actual seisin of the rent* in the case of *rent services*, to ground an *assize;* because this is a remedy for the *restitution of the freehold* of which the party was once in seisin or possession: but the fealty in the former case can be no actual seisin of the other services; because, though the tenant, by his oath of fealty, has solemnly undertaken for the faithful performance of them, yet such undertaking is not an actual performance; and consequently the lord is not thereby seised of his services: but such oath gives him a right to them, and the law has given a correspondent remedy to that right, which is by pledges or distress.

Therefore, if there be lord and tenant by rent service, and the lord grants the services to another, and the tenant *attorns* by a *penny;* and the grantee afterwards distrains for the rent in arrear, and the tenant rescues the distress; yet the grantee shall have *no assize* for the rent, but a writ of *rescue:* because the penny was given in the name of *attornment*, which only shows the tenant's concurrence

[*109] *to the grant, and that he is willing to pay the rent when it becomes due to the grantee,(*q*) as he formerly did to his first lord. But such concurrence or approbation of the tenant only obliges him to pay the rent when it becomes due, but does not give the grantee an actual seisin before it is paid him; and consequently there can be no disseisin of a thing of which a man was never in possession.

But if the *penny* had been given by way of *seisin* of the *rent*, that had

(*p*) 4 Co. 8. Bevil's Case. 1 And. 57, 58. Co. Lit. 68. a. Bro. Avow. 24, 32.
(*q*) Lit. Sect. 565.

been sufficient to ground an assize: because here the grantee is put into possession of the rent by the tenant himself; and therefore, if the possession be violated, the grantee may have his *assize*, which is the proper method or remedy to restore that possession.

If a lease be made for life, or a gift in tail, reserving the first year a *bushel of wheat*, and afterwards the *annual rent* of 5*s.*; if the lessee pays the bushel of wheat to the lessor, that is a *sufficient seisin* of the annual rent to ground an *assize:*(*s*) because the wheat and rent, though they be things of a *different nature, are but one intire reservation; and the seisin of *parcel* is sufficient to have an [*110] *assize* of the *whole service*.

So it is in the case of a rent seck; if the tenant pays any *parcel* of the rent to the grantee,(*t*) and afterwards refuses to pay the remainder of the rent that is due, if the grantee himself, or any person impowered by him, demands the rent upon the land, and the tenant does not pay it, the grantee may have his assize.

If there be lord, mesne and tenant, and the mesnalty becomes seck *by surplusage*,(*u*) yet the ancient seisin of mesnalty, though the nature of it be changed, is sufficient to maintain an assize. But to explain this by an instance; if there be lord and tenant by 6*d.* rent, and the tenant makes a feoffment in fee, reserving rent 12*d.*; the rent of 12*d.* was before the statute of *quia emptores*, &*c.* a rent service in the mesne, for which he might have distrained: if then the lord had purchased the tenancy, the seignory of 6*d.* which the mesne paid the lord had been extinct; *because the lord could not have both the land and his seignory issuing out of it: and though the lord purchased from [*111] the tenant, yet he could not hold from the mesne as the tenant did; because he must hold of his old superior lord: in this case, however, the rent of sixpence, which the mesn ereserved to himself, over and above the seignory of 6*d.* which he paid to the lord, shall not be lost, but the mesne shall have so much issuing out of the land, though not as a rent service; because the lord, who purchased the tenancy, is not in his homage, the tenure being of the superior lord of the fee: yet 6*d.* surplusage, is such a rent as the mesne may distrain for, and have his assize; because, being once in seisin of it as a rent service, the act of the lord and tenant, which extinguishes the mesnalty, and changes the nature of the rent, shall not deprive the mesne of his remedy, which he might have had for the recovery of such rent before the purchase; because the mesne ought not to receive any prejudice from the acts of another to which he was a stranger, and never gave his concurrence: *and therefore the [*112] seisin of his mesnalty, before the purchase, is sufficient to maintain an assize for the 6*d.* surplusage, when the mesnalty is extinct from the purchase.

But if there be lord and tenant by fealty and rent,(*v*) and the lord grants over the fealty, the rent is now become seck; because, by the grant of the fealty, the tenure is no longer of the lord, but of the grantee: for the tenure cannot be of the lord, when he by his own act has permitted

(*s*) 4 Co. 9, a. Co. Lit. 153, a. 5 E. 4. 2. 2 Rol. Ab. 463.
(*t*) Lit. sect. 233.
(*u*) 4 Co. 9. Co. Lit. 152, 153. a. Kelw. 104. a.
(*v*) 4 Co. 9, b.

the tenant to do fealty to the grantee; which is a full acknowledgment that the land is held of the grantee: and the rent that remains in the lord's hands is become seck, because the tenure and fealty, which made it a rent service, are disunited from it, by the act of the lord himself; and consequently as a rent seck, there must be a seisin of it before it can be recovered in an assize.

So it is, if there be a gift in tail,(*w*) or a lease for life, reserving rent,
[*113] and the donor or lessor grants the reversion, *saving the rent, this rent is become seck, and the donor or lessor must have seisin of it after the grant, to maintain an assize. And the reason is this; because the rent, by the reservation upon the lease or gift, was in nature of a retribution for the land, which the law obliges the tenant, under the engagement of the oath of fealty, to make; but this oath of fealty can be obligatory only while the tenure between the lessor and lessee continues, the words of the oath being, "*that the tenant shall bear faith for the lands which he holds;*" whereupon, when the lessor grants the reversion, the tenure is of the grantee, and the fealty as an incident to it follows the reversion; because the design of the oath is to oblige the tenant to bear faith for the lands that he holds, and consequently that faith must be born to him of whom the lands are holden; and therefore the donor or lessor, having by his own act dispensed with the obligation the tenant was under to pay him, has no remedy to oblige him to pay,
[*114] and consequently cannot maintain an assize for *the rent upon the old seisin before the reversion was granted.

But if the lord grants his seignory upon condition,(*x*) and the tenant pay his rent to the grantee, and the condition is afterwards broken, if then the lord distrain for his services, and the tenant rescue the distress, the lord shall have his assize; because by a breach of the condition, the lord is replaced in his ancient estate, and as if the grant had never been made.—*Quære tamen*, whether an ancient seisin be sufficient.

If a return *irreplevisable* be awarded, that is a good seisin of the rent, for which the distress was taken: because such return is an absolute condemnation of the pledges,(*y*) and being given as an equivalent for the rent, they shall be looked upon as the rent itself, since they are a full satisfaction for it; and if they were otherwise, that obstinacy of the tenants might defeat the lord of his proper remedies.

[*115] *So if the tenant refuses to do *suit of court*,(*z*) and the lord recover damages against him; this is a sufficient seisin of the suit: because the damages are given against him as an equivalent, and in satisfaction of the suit.

Who may give *seisin* of a rent to ground an assize.

And here it has been resolved, that tenant for *years* of land out of which a rent seck issues cannot, by payment of the rent(*a*) give the grantee seisin; because the termor for years having no interest in the freehold out of which the rent proceeds he cannot, by any act of his bind another's interest. Therefore, if a man devises a rent of 10*l.* out of his lands to A. for his life, and devises the lands chargeable with the rent to B. for years, and dies; though B. pays the rent to A. during the term, yet this

(*w*) 4 Co. 9, b.
(*x*) 4 Co. 9, b. 2 Rol. Ab. 465. Co. Lit. 202. b. al con'.
(*y*) 4 Co. 9, b. 2 Rol. Ab. 464. (*z*) 4 Co. 9, b.
(*a*) 6 Co. 56, 57. Bodman's Case. Cro. Ja. 142 and 185. 2 Rol. Rep. 181. 2 Rol. Ab. 485.

is not a sufficient seisin for A. to bring an assize against him that has the freehold of the land after the term expired: for the termor is a perfect stranger to the *freehold, and consequently cannot affect it, [*116] or the proprietor of it, by any act of his. And since an assize for such rent must be brought against the tenants who have the freehold, it is but reasonable, that they only, who are to answer in the assize should make themselves liable to the remedy.

But seisin of a rent seck by the hands of a disseisor is sufficient to ground an assize;(*b*) because, though his title be defeasable, yet, until it be defeated, he is in seisin both of the freehold and inheritance; and therefore all lawful acts done by him, without fraud or covin, shall bind the disseisee.

So if there be tenant in tail of land, and he makes a feoffment in fee,(*c*) if the discontinuee pays the rent, this is a sufficient seisin to ground an assize upon; because any lawful acts done by the tenant of the freehold, though by a defeasable title, are obligatory, or else in many instances such disseisins would be extremely prejudicial to strangers.

*But though, by the policy of the feudal law, there was no [*117] remedy for the recovery of a rent seck, without the grantee had an actual seisin of it;(*d*) because such grants, as it is said, were so far from contributing to the public safety, as feudal donations, that they really weakened it; and therefore were said to be *against common right:* yet as those tenures declined, and were at length abolished, the chancery interposed to mitigate the rigour of the feudal law; and it has been therefore ruled in equity, that where an annuity was devised by will to A. and the land, subject to the annuity, to B. that B. should give seisin of the rent seck to A.; that he might have a remedy for the recovery of it at law: for certainly the intention of such gift is, that the devisee should receive some benefit from it; and therefore it is but reasonable, that a court of equity should give relief.

A bill was brought for 3*l.* for a rent of 5*s.* arrear for 12 years; the equity of the bill being, that the deeds by *which the rent [*118] was created were lost, and consequently the rent, *at law:* the court, upon the plaintiff's proving the constant payment till the last 12 years, decreed the defendant to pay the arrears, and growing rent:(*e*) for since by the payment, it was evident the plaintiff has a right to the rent; and that he could not, without his deeds, make a title at law; therefore the court decreed the defendant to pay the rent; and so subjected his person, which possibly might not have been liable by the deeds that created the rent.

Another remedy which the law has provided for the recovery of rents, is *the writ of annuity.* As if a man grants by his deed, an annual rent to A. in fee, for life, or for years, and the rent is behind; the grantee may bring his writ of *annuity* against the grantor,(*f*) and thereby charge his *person:* and this remedy is founded upon the words of the *contract*, which, being presumed to be grounded on a valuable consideration, is always

(*b*) 2 Rol. Ab. 464. 6 Co. 57. b.
(*c*) Co. Lit. 269. a. 2 Rol. Ab. 464.
(*d*) 1 Chan. Cas. 79, 147. Moor pl. 859. Webb v. Webb, Lutwich 1092, 146. 4 Leon. 184.
(*e*) 1 Chan. Cas. 120. Collet v. Jacques.
(*f*) Lit. Sect. 219. F. N. B. 152, a. 6 Co. 58, b.

taken most strongly against the grantor. And therefore where a man
[*119] grants an annual *rent, the *person* granting is as well liable to the charge as the *land;* because the person of the grantor ought to be liable to the payment of what he himself hath given. And hence it follows;

First, That no writ of annuity lies for a rent service;(*g*) because the rent service, being something reserved by the lessor by way of retribution for the lands demised, proceeds not from the grant of the lessee, the reservation being the act of the lessor; and consequently the person of the lessee ought not to be liable to the discharge of a thing he never granted: for the lessee is only passive, and takes the land upon such terms of the lessor as he is willing to part with it; and, by such acceptance of the land, agrees to the reservation of the rent;—And hence it follows, that, since the statute of *quia emptores, &c.*, if a man makes a feoffment in fee. reserving rent, no writ of annuity lies for it: for, since the statute, this can be no rent service, because the tenure is not of the feoffor, but of the
[*120] superior lord; and *consequently the feoffee is not under the engagement of the oath of fealty to the performance of it: and, since the rent arises from the words of the feoffor, the *person* of the feoffee is not liable to the payment of a rent, which he never granted; and therefore is not chargeable with it: yet by the acceptance of the feoffment, he takes the land subject to the charges, which the feoffor has laid upon it; and such acceptance, admitting the charge, amounts to a *grant* in law to ground an avowry upon; but the feoffor cannot avow for it as a *service* since the statute.

Secondly, it follows; that if a man devises a rent out of his land, and dies, no writ of annuity lies for such rent:(*h*) because the devise cannot take effect till after the death of the devisor, and then it is impossible to charge the person.

But no writ of annuity lies for rent granted for *equality* of *partition*, or in lieu of *dower:* for though these be given by the person, yet be-
[*121] ing given *in satisfaction of a *real estate*, they retain the nature of the things for which they were given;(*i*) and therefore not recoverable in a personal action.

If a man grants a rent out of his land, and by a *proviso* in the deed of defeasance it be provided, that the grant nor any thing therein contained, shall be construed to extend to charge his *person* by writ of annuity; in this case, the person of the grantor is not chargeable: because the charge upon the person, arising only from the manner of construing grants,(*k*) which, from the consideration given, ought to be extended as far as the words will bear against the grantor; there can be no room for such construction, when, by the express words of the grant, the person of the grantor is not to be charged: for no implication shall be admitted to overthrow an express clause in the deed. But if, in this case, the proviso had been, that the grant, nor any thing therein contained, shall charge the *land*, that proviso had been void; because no subsequent clause(*l*)
[*122] shall be allowed to defeat the former part of the *deed: and therefore, when by the first part of the deed the land is ex-

(*g*) 2 Rol. Ab. 226. 1 H. 4, 4. (*h*) 6 Co. 58, b.
(*i*) Co. Lit. 144, 5. 2 Rol. Ab. 223.
(*k*) Lit. Sect. 220. Pop. 87. 6 Co. 87, b.
(*l*) Co. Lit. 146, a. Pop. 87.

pressly charged with the rent, the proviso to exonerate it is inconsistent, and therefore void.

So it is if a man grants a rent charge out of the manor of D., in which the grantor has *no interest;* with a proviso, that the grant shall not charge his person; this proviso is void; because the grantor, having nothing in the manor of D., could not by any act of his charge it; and consequently, the grantee having no remedy for his annuity, but against the person of the grantor, the *proviso* to exempt his person is void;(*m*) as rendering the whole grant ineffectual. And if in this case the grantor had been seised of the manor, and had granted a rent charge out of it for the life of the grantee, with a proviso, that the grant should not charge his person, the *grantee himself* could have no remedy but by *distress;* because that remedy being open to him, the proviso is good to *exonerate* the person: yet, upon the death of the grantee, the *executors* may have an action *of debt against the grantor for the arrears; because the executors have no other remedy for the recovery of them, [*123] for they cannot distrain after the grant is determined: and therefore the proviso to exempt the person of the grantee is void against the *executors*, as rendering the grant useless and ineffectual.

And hence it is; that if a *rent seck* be granted out of lands with a proviso, that the person of the grantor shall not be charged, that this proviso is void: because the grantee not having a distress given by the deed for the recovery of the rent, would be without any manner of remedy,(*n*) if the proviso took place: but in this case, if the grantor had given a penny, or any other thing, in the nature of seisin of the rent, the proviso to exonerate the person had been good; because then, the grantee, having been once in seisin of the rent, shall be restored to it by writ of assize, if the grantor disseises him by non-payment; and consequently, by such exemption of the person, the grant is not rendered ineffectual.

*If a man by his deed grants;(*o*) that if A. be not yearly [*124] paid the sum of 10*s.* that then he may distrain for it in his manor of D.: this is a good rent charge out of the manor; but no writ of annuity lies for it, because there is no grant of the rent made by the grantor; yet, because he hath given the grantee a power to distrain, if such a yearly sum be not paid him, the manor is thereby charged with the distress, and consequently with the rent for which the distress is given.

If A. and B. joint-tenants grant a rent charge out of their land,(*p*) with a proviso, that the grantee shall not charge the person of A.: this discharges the person of A.; but leaves B. liable to the writ of annuity.

Wherefore, since there are two remedies for the recovery of a rent charge and rent seck; either by *writ of annuity* or *distress* on the lands in case of a *rent charge;* or by *assize* in case of a *rent seck* after seisin: —it is next to be considered what is most adviseable *to [*125] pursue;—and 2ndly, what acts of the grantee shall determine his election. Now to show the difference between the remedy by *writ of annuity* against the person of the grantor, and the other remedies by *distress* or *assize;* we shall consider the following case in both lights, either as annuity, or a rent charge.

(*m*) Co. Lit. 146, a. 61, 41, b. 7 Co. 38, b.
(*n*) 6 Co. 58.
(*o*) Lit. Sect. 221. Co. Lit. 146, b.
(*p*) Co. Lit. 147, b.

1st. In what cases distress, or the writ of assize, and in what cases the writ of annuity are the more eligible remedy.

If A. grants a rent charge to B. *and his heirs;* if the rent be behind, not only the *grantee*, but his *heirs in infinitum*, may distrain for it.(*q*)—And so in case of a *disseisin*, they may for ever pursue their *assize*, and *writs of disseisin:* because while they demand it as a charge affecting the land, it must have a continuance, under that determination, while there are any heirs or representatives of the grantee in being; and the remedy being commensurate to the right, must be equal in its duration with the right.—But if *in this case the rent be in *arrear*, and the grantee brings a *writ of annuity*, in order to charge the person of the grantor; it is no longer to be considered as a rent issuing out of the *land:* because the *writ of annuity* has turned the charge entirely upon the *person* of the grantor; and, under that determination, it must determine with the life of the grantor; because his heir is not chargeable: and therefore the writ of annuity is far from being an adequate remedy, because it turns the rent charge in fee, into an annuity for life. And the reason why the *heir* is not chargeable in this case, as the *executor* is in case of a *bond* entered into by the testator without being named, is this; by the common law, only the goods and chattels of the debtor, and the annual profits of the land, as they arose, and *not the land* itself were liable to execution for debt or damages; because it was only a *chattel* that was lent, and therefore only the *chattels* of the debtor were liable: and these, being the security the creditor depended upon, were liable in the hands of the representative *or executor, as well as in the hands of the debtor himself.—And hence it was, that the executor was bound to answer the debt of the testator, so far as he had chattels or assets, though he was not named in the contract.—But the lands were not liable to execution; because they were preserved from the personal contracts and engagements of the tenant, that he might be the better able to answer the feudal duties to the lord, which were the life and support of the government: and, therefore, the land, not being originally liable to the demands in the hands of the grantor, must be much less liable in the hands of the heir, who was not comprehended in the contract or grant: but if A. had granted, *for him and his heirs*, to B. *and his heirs*, such a rent charge out of his land; in this case, the heirs, being comprehended in the contract, are bound to make good the grant, so far as they have assets by descent: for the grantee of the rent had the land originally in view for his security; and by the grant itself having it in his power to distrain the land for the rent, it was equal to the heir, *whether the land was to answer the rent by distress, or by execution upon a judgment in a writ of annuity.

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Again, if a rent charge be granted in tail,(*r*) the grantee cannot alien it whilst it continues a rent; because, as such, it may be intailed within the statute *de donis:* but if the grantee brings his writ of annuity, it is no longer within the statute; because then it is become a charge merely *personal*, without any relation to the land out of which it was first granted; and therefore is become a fee-simple conditional, as such a gift

(*q*) 1 Rol. Ab. 226. Pop. 87. Hob. 58. Dy. 344, b. Co. Lit. 144, b.
(*r*) Pop. 87. Co. Lit. 19, a. 7 Co. 61.

of land would have been before the statute; and therefore the annuity, not being before the statute, may be aliened.

But in some respects the *writ of annuity* is the better remedy:(*s*)—as if a termor for years grants, for him and his heirs, a rent charge out of his lands, to another and his heirs: in this case if the grantee *distrains*, and thereby has thrown the charge off the person entirely upon the land; upon the expiration of the term, the rent is *gone: because the gantor could not charge the land longer than his own interest in it continued.—But if the grantee had brought his *writ of annuity*, the charge upon the person had been perpetual, so long as the heirs of the grantor had any assets: because the grant was for *him and his heirs;* and therefore the *heirs*, being comprehended in the grant, shall be bound by it, while they have any assets from the first grantor. [*129]

2dly, What acts of the grantee are sufficient to determine his *choice.*

And this determination must be *by some solemn act in a court of record:* that it may appear to be the *act* of the grantee himself, and not of a stranger, without his permission or authority. And, therefore,(*t*) if the grantee distrains for the rent, that is no *determination* of his *election:*—so in the case of an *assize*, or writ of annuity, the *suing them forth* is no determination; because these may be done by a stranger, without the grantee's knowledge or consent: or rather, because the design of *the law being to help men to the recovery of their rights in the most beneficial and best method; the grantee shall not be foreclosed, of either of his remedies, by any rash unadvised act of his. But if the grantee *counts* in the assize, or writ of annuity; or *avows* the taking of the distress; the *count*, and the *avowry*, is a repeated determination, or plain confirmation of his first *choice* and election; and this, being entered upon record, is taken to be the deliberate act of his mind: and therefore he shall not be allowed to recede from what he has done in so solemn a manner. [*130]

But if a man grants a rent charge in fee,(*u*) without saying *for him and his heirs*, and the grantor dies, and the grantee brings a writ of *annuity* against the heir; though he *counts* thereon, and proceeds to *judgment*, yet that does not foreclose him of his distress on the land, out of which the rent issues: because by the death of the grantor, the grant, *as an annuity*, was determined; and, consequently, the grantee had no election, having but one remedy for *recovery of it, which was *by distress;* which in this case still remained, because the grantee lost his election by the *act of God*, for which no man ought to suffer. [*131]

So it is if tenant *pur auter vie* grants a rent charge for 10 years, and the *cestui que vie* dies:(*v*) in this case the charge is determined as a rent; because the estate for life out of which it issues is ended: but the grantor is still liable to a writ of annuity; because the grantee had not, by any *act of his own*, determined his *choice;* and, therefore, the election being taken away by the *act of God*, and not by any *act of his own*, he may pursue the other remedy by writ of annuity.

But if the grantee of a rent charge, before he has made his election,

(*s*) Pop. 87.
(*t*) Lit. sect. 219. 1 Rol. Ab. 228. Co. Lit. 145.
(*u*) Dy. 344, b. Hob. 58.
(*v*) Pop. 86, 87. Fulwood v. Ward. Co. Lit. 148. Moor, 301. 2 Co. 36.

purchases part of the land; in this case he is without any remedy, either against the *land*,(*w*) or the *person* of the grantor: the *land* is not liable because the rent is *extinct* by the purchase, for reasons which shall be hereafter given, it being in its original creation a rent *charge:
[*132] and though the law gives a double remedy for the recovery of it, yet when the grantee has, *by his own act*, discharged the land, and *extinguished* the rent, he can have no remedy for the thing which he had *wilfully* destroyed; and therefore he can have no writ of annuity against the *person*.

Of the Remedies for Recovery of Rents by the provision of the parties.

The remedies for the recovery of rent which arise from the *provision and appointment of the party*, are either by *distress;* or by a power of *re-entry* into the lands, out of which the rent issues, and to hold it till the grantee be satisfied by the perception of the profits. The *distress* is necessary to be provided by the deed, *only* in case of a *rent charge*. For the mere *grant* of a rent out of lands, does not subject the land itself to a distress; as the *reservation* of rent service upon a *gift* or *lease* makes the land in return for which the services are given,
[*133] liable to *distress for the payment and discharge of it: because in the *rent charge* there is nothing, in the nature of the grant itself, to found such a remedy upon; nor is the tenant of the land *in that case*, under an engagement of the oath of fealty to pay it, as he is in the case of a *rent service*, because there is no *feudal tenure* between the grantor and the grantee; and, consequently, not that mutual engagement which arises between the lord and tenant, by a *feudal donation* or *gift*. And hence it is, that these grants are said in the law books to be *against common right;* that is, they were against the policy of the *feudal structure:* because such grants create no dependency of the grantee on the grantor; nor was he obliged to attend the grantor in the wars, or venture his life for the public on account thereof, as the person that took under any *feudal donation* was obliged to do: but on the contrary, the tenant, that granted such a rent out of his land, was thereby less able to perform the feudal duties; and therefore it was, that the law provided no remedy, but *left the party to provide one for his own security.
[*134] If a man seised *in fee* of lands, and possessed of other lands *for years*, grants a rent charge for life out of *both*, with a power to distrain in *both;* if the rent be in arrear, the *leasehold* as well as the estate of *inheritance* are subject to the distress; because a man may oblige his chattels to the discharge of the rent: but that rent, being a freehold, shall only issue out of the estate of inheritance; because the leasehold, being only a temporary and perishable interest, is not a fund sufficient to the charge:(*x*) and therefore the rent shall issue out of the inheritance, which for its duration is a more competent estate to support the charge, and render the grant effectual. And hence it was adjudged in Butt's case, that though the grantee might *distrain* the *leasehold* lands, he may *avow* for a rent issuing out of the *inheritance*. But if a man possessed

(*w*) Co. Lit. 148.
(*x*) 7 Co. 23, 24. Butt's case. Co. Lit. 147, b. Cro. Ja. 390. Rol. Rep. 330. Cro. Eliz. 622.

of *a term for years* grants a rent charge out of it to another *for life:*(*y*) though here the estate being of shorter duration than the *charge, yet, because it is the only fund provided by the [*135] grant for the payment of the rent, it shall answer the grantee so long as it has continuance, if the life for which the rent was granted, lasts so long as the term: for the grant shall be taken most strongly against the grantor that made it; and therefore shall not be construed to be void *ab initio*, when it may possibly take effect according to the intention of the parties.

The condition of *re-entry* for non-payment, was the remedy given by the old feudal law, which was afterwards changed into a distress; but is yet a remedy allowable by law, where the parties provide it by the deed. As if a man made a feoffment, gift, or lease, reserving rent,(*z*) with a condition, that if the rent be behind, it shall be lawful for the feoffor and his heirs to *re-enter:* in these cases, if the rent be behind, and not paid according to the deed; the feoffor, or lessor, may enter into the lands, and hold them in his former estate, because the estate was *not absolute*, but **defeasable* by the non-performance of the condition.

But where a feoffment is made of lands,(*a*) reserving rent [*136] upon condition, that if the rent be behind, it shall be lawful for the feoffor and his heirs, to enter and hold the land, and take the profits, *until he be satisfied and paid the rent behind;* this is not a condition absolutely to defeat the estate: but the feoffor, in this case, upon his entry, shall only hold the land as a *pledge*, or in manner of a distress, till he be paid his rent; and the profits shall not go in discharge or on account of the rent, but shall be applied to his own use, that by such perception, the tenant may be obliged the sooner to pay the arrears of rent.

But if the condition had been,(*b*) that if the rent be behind, the lessor should re-enter, and take the profits *until thereof he be satisfied;* there the profits shall go into the account of the rent: and, consequently, when the profits received are equivalent to the arrears of rent, the lessee may re-enter and hold *it under the former lease: and though part of the rent be paid the lessor before the re-entry, yet if the [*137] whole be not paid him, he may enter for any part that is in arrear; because the condition is to enforce the payment of the whole rent, and therefore he may take advantage thereof for non-payment of any part of it.

If a man grants a rent charge to A. his heirs and assigns, and if it shall happen, that the rent be behind and unpaid, that then the said A. his heirs and assigns,(*c*) shall re-enter into the land, and have and enjoy the rent thereof *until the arrears be fully satisfied;* and the grantor covenants to levy a fine to the *uses* of the said deed: if, after the fine levied, the rent be in arrear, the grantee may enter into the land, or make a lease for years, to try the title in ejectment: because, by the fine, there is an estate vested in the *conusee* to raise an use in the grantee of the rent charge, when the rent is behind; and whenever the rent comes in arrear, the possession is executed to that use; and consequently, the grantee *has a right to take and keep that [*138] possession, until the use for which it was executed be satis-

(*y*) 7 Co. 25, a. Cro. Eliz. 183.
(*z*) Lit. sect. 325, 326. Co. Lit. 201, 202.
(*a*) Lit. sect. 327.
(*b*) Co. Lit. 203.
(*c*) Cro. Ja. 510, 511, 512. 2 Rol. Rep. 12. Pop. 126, 149. 3 Bul. 250. 1 Sid. 262. 1 Leo. 171.

fied; and that was, till the arrears of rent be paid by the preception of the profits. And therefore, though the grantee's interest in the land be uncertain, because it is uncertain when the rent will be paid out of the profits, yet while his interest remains, if his possession be disturbed or divested, he may restore it by ejectment; which is the proper method or remedy to recover the possession. And if the grantee assigns over the rent, the assignee may likewise enter and maintain a title in ejectment: for the use arises out of the estate of the conusee, only as the rent is in arrear, and, till the rent be behind and unpaid, there is nothing more than a bare possibility of an use, which in its nature is not assignable, yet by the conveyance of the rent it shall pass; because it is nothing more than a remedy or security for the rent, and therefore shall attend that into whosesoever hands it shall come. And, by the better opinion,(*d*) it seems, that if the rent be in arrear *before* the fine levied, yet
[*139] the fine levied afterwards *shall be sufficient to raise an use in the grantee to enter into the land for the recovery of these arrears; because the fine is guided by the deed of grant, and both amount but to one assurance: and consequently, the fine shall have relation to the deed which leads the uses of it, and make it operate.—So it is if such a rent had been granted to a man and his heirs, and if the rent be behind and unpaid,(*e*) then it shall be lawful for the grantee and his heirs to enter, *&c.:* the grantee, when the rent is in arrear, by such proviso, may enter, and hold the lands till he be paid the rent by the perception of the profits; for though it was objected, that there was no estate conveyed out of which an use might arise to the grantee upon the non-payment of the rent; and that this grant could pass no estate to the grantee as a conveyance at common law; because the grantee could have no inheritance or freehold in the land when the rent was in arrear, for want of *livery;* nor an estate for years, for want of a *certain commencement and determi-*
[*140] *tion:* yet it was adjudged, that by the *grant, he had an *interest* vested in him when the rent was in arrear; and though it be an *uncertain interest,* which, for the uncertainty of its commencement and determination might be void by the strict rules of law, if it were granted independant on any certain estate; yet it is good in this case, because it is created to attend a determinate estate, and non-payment of the rent fixes the *certainty* of its *beginning,* and the satisfaction of the arrears, by the perception of the profits, the *end* and *determination* of such interest: and therefore the grantee may reduce such interest, as it arises, into his possession, by ejectment, which is the proper method to recover the possession.

Of the Nomine Pœnæ.

And this is not so much a *remedy* for the *recovery* of rent, as a *penalty* to oblige the tenant to a punctual payment; and this as well of a rent charge, as a rent service: of this there are these three things observable.
[*141] *1st, In the case either of a rent *service* or rent *charge,* if it be granted, that if the rent be in arrear, the tenant shall

(*d*) Bro. Ja. 512.
(*e*) 1 Sid. 223, 226, 344. 1 Lev. 170. 1 Keb. 784. Ray. 135, 158. 1 Sand. 112, 113.

forfeit 8*d.* a day as a *nomine pœnæ*, there must be an *actual demand* of the rent at the day, to give a *title* to the *penalty;* because till an actual demand is made,(*f*) it cannot appear that there was any default or neglect in the tenant: and it were unreasonable to oblige the tenant to pay such penalty without a wilful default; for the presumption is, that he was ready to pay the rent, to save the penalty: and there is no way to overthrow the presumption, but by proving an actual demand made; and then, if such actual demand be not answered by payment, it is evident, that the tenant has wilfully neglected it, and consequently has submitted to the penalty.

But if the rent be demanded at the day, and not paid, and consequently the penalty forfeited:(*g*) (as if a rent be granted to A. for life, and if it shall be in arrear by the space of 10 days after the feasts of payment, being lawfully *demanded, that then the grantor should forfeit 10*s.* by way of *pain;* and that then, and so often, it shall be lawful [*142] for the grantee to distrain until the rent and penalty be satisfied:) by the opinion of Hobart, if the grantee demands the rent at the end of 10 days, by which he becomes intitled to the penalty, the grantee, *on the 11th day*, must *likewise* demand the *penalty*, because it is not due till after the 10 days incurred; and the grantor has the whole day on which the penalty becomes due to pay it. Q. Whether the grantee be obliged to demand the penalty after it becomes due by the demand and non-payment of the rent.

But if the plaintiff brings an action of debt, or avows for the rent and *nomine pœnæ*, without laying an actual demand for the rent; though he cannot recover the penalty for want of such demand, yet he shall by such suit have judgment for the rent: because that is really due, and ought to be paid without any demand.(*h*)

*2dly, If the tenant that is chargeable with the rent assigns over his interest in the land,(*i*) it seems, the assignee is charge- [*143] able with the penalty, for any arrears incurred in his own time; because, the *nomine pœnæ* being intended as an obligation on the tenant to pay the rent, that obligation, from the nature of the contract must have continuance so long as the rent is payable: and therefore, whoever takes the land takes it under the charge of the rent, and consequently must be subject to that penalty and security, which was originally taken upon the contract for the rent.

3dly, If the rent be devised, without mentioning the *nomine pœnæ*,(*k*) the *nomine pœnæ* shall nevertheless pass as *incident* to it; because whoever has a right to the rent, ought to have all that security for the payment of it, which was taken upon the original security and creation of it.

4thly, The *nomine pœnæ*, as incident to the rent, shall descend to the *heir;(*l*) because being a penalty or security to engage the [*144] payment of the rent, whoever has a right to the rent, ought in reason to have the like to the penalty, which is to oblige the tenant to pay it. But the statute of the 32 H. 8, giveth no remedy for the recovery of the *nomine pœnæ*, as it doth for rents: because the grantee of a rent charge might have an action of debt for the arrears of a *nomine pœnæ* at common

(*f*) Hob. 133.
(*g*) Hob. 208.
(*h*) Hob. 82, 133.
(*i*) Cro. Eliz. 333. Thinn v. Chomley.
(*k*) Cro. Eliz. 895. Budloss v. Phillips.
(*l*) Co. Lit. 126.

law; for, being only a *penalty*, they looked on it to be only a *chattel*, since it did not grow due with every gale of the rent, but arose casually upon the non-payment of the rent at the day. And for the same reason, the executors of the grantee might have an action of debt, and consequently there was no necessity for the statute to provide a remedy.

[*145] *VI. What acts of the lessor or lessee shall amount to a *discharge* of the rent: and herein is to be considered, the *eviction* of the land; the *suspension; extinguishment;* and *apportionment;* of the rent.

A *rent service* is something given by way of *retribution* to the lessor for the land demised by him to the tenant; and consequently, the lessor's title to the rent is founded upon this; that the land demised is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for a thing he has not: if therefore, the tenant be *deprived* of the thing *letten*, the obligation to pay the rent ceases; because such obligation had its force only from the consideration, which was *the enjoyment of the thing demised.*—From hence then we may gather these conclusions or inferences.

1st, That if the lands demised be *evicted* from the tenant, or *recovered* [*146] *by a title *paramount*,(*m*) the lessee is discharged from the payment of the rent, from the time of such eviction: but, notwithstanding such recovery or eviction, the tenant shall pay the rent that became due before the recovery: because the *enjoyment* of the land being the *consideration* for which the tenant was obliged to pay the rent, so long as the *consideration* continued, the obligation must be in force; there being the same reason that the tenant should pay the rent, for part of the time contracted for, as for the whole term, if he had enjoyed the land so long.

So if a disseisor makes a lease for years, rendering rent, and afterwards the disseisee enters, and *ousts* the lessee:(*n*) yet the lessee shall be accountable for the rent incurred *before* the *ouster;* because the lessee cannot be taken for a trespassor, since he came into the land under the sanction of a legal contract; though the disseisor, having but a defeasable title, could not perform the contract; however, till it was destroyed, and [*147] while the lessee had the peaceable *enjoyment of the land, that obligation to pay the rent, which was founded upon the enjoyment, must continue; and consequently, the lessee be obliged to pay the rent, till the entry of the disseisee.

For the same reason, if *part* only of the land that was letten be *evicted* from the tenant;(*o*) such eviction is a discharge of the rent, in *proportion* to the value of the land evicted.

If A. lets several lands to B. and afterwards the owner of inheritance of the town where part of the land lies, recovers a right of common,(*p*) in which is part of the land demised; this recovery, by the strict rules of the *common law*, makes no apportionment of the rent, because the recovery of the common is no eviction of the lands, for the soil still remains in the lessee; and therefore there can be no apportionment: but a

(*l*) Co. Lit. 126.
(*m*) 2 Rol. Ab. 429. Hob. 82. Cro. Eliz. 47. Co. Lit 201. b. 148. b.
(*n*) 2 Rol. Ab. 429. b. 2 H. 6. 20. b. (*o*) 10 Co. 28. a. 2 Rol. Ab. 235. Dy. 56.
(*p*) 1 Chan. Ca. 32. 1 Rol. Ab. 934. 2 Rol. Rep. 398, 415. 2 Jones 148.

court of equity considers, that the lessee shall have little benefit by the soil itself, while others are permitted to take the profits in common with him; and *therefore, in such cases have apportioned the rent; unless it appears, that, notwithstanding such right of common [*148] recovered, the lands demised are well worth the rent reserved upon the lease.

But these former cases are to be understood with this restriction:(*q*) that, if the tenant be ousted by a *title paramount*, before the day appointed for the payment of the rent, such *eviction* discharges the tenant from payment of any part of the rent. For instance: if A. lessee for life, makes a lease to B. for years, rendering rent payable at *Easter;* and B. by virtue of the lease, enjoys the land for 9 months; and then A. dies, by which the interest of B. is determined; in this case, B. shall pay no rent at all: for though he held the lands for 9 months, yet his lease being ended before the expiration (for the rent being made payable at *Easter* only, was payable but once in the year,) there could be no rent due by the contract; for it was, in consideration of the enjoyment of the land, that the lessee, by the contract, was obliged to pay the rent at the expiration of the *year; and when the enjoyment is interrupted and destroyed, the lessee shall not be obliged to pay [*149] for what he had not: nor can there be any *apportionment*, because, by the express words of the lease, it was to be paid at *Easter*, and not before.—From whence it is observable;

1st, That in all leases, whose end and determination is *uncertain*,(*r*) it is most advisable for the lessor to make the rent payable at four *quarterly* payments at least.

2dly, We may infer; that as the tenant is discharged from the payment of the rent when the land is *evicted* by a title *paramount:* so, by a parity of reason, he shall be discharged from it, when the lord purchases the *tenancy;* for in such case, the lord cannot have both the land and the rent: nor shall the tenant be under any obligation to pay rent, when the land, which was the consideration, is resumed by the lord into his own hands: and this *resumption* or purchase of the tenancy by the lord, makes, what the law books call an *extinguishment* of the rent; that is, the rent can never become *due or payable by the tenant, by virtue of the feudal donation which created the [*150] tenancy, when the land, or tenancy, is conveyed to the lord, in as absolute a manner as he was seised of the rent: for the rent can never revive, when the tenant has made an absolute conveyance of the land to the lord, in consideration of the enjoyment whereof the tenant was only obliged to the payment of the rent.

3dly, If the conveyance of the land was not *absolute*, but upon condition:(*s*)—or if it were only of a particular estate, of shorter duration than the estate which the lord had in the rent service;—in these cases, though there be an *union* of the tenancy and the rent in the same hand, yet because that *union* is but temporary, (for upon the performance of the condition, or determination of the particular estate, the tenant is restored to the enjoyment of the land by virtue of the old donation; and consequent-

(*q*) 10 Co. 128, a. (*r*) Vaugh. 199. Pollex 142.
(*s*) Bro. tit. Extinguishment, 17. Vaugh. 39, 109. Pollex. 142.

ly, the obligation to pay the rent revives,) therefore the rent in such case is only *suspended*, not *extinguished.*

[*151] *But in what cases a rent shall be *extinguished* or *suspended* by the purchase of part of the land; or by taking a lease for a shorter term than the tenant has; may more regularly be digested under the consideration of *apportionment* of rents: and therefore we shall consider the *apportionment* of rents under the following division:

1st, In what cases a rent may be apportioned by the act of the *party*, and herein of the difference between a rent *service*, and a rent *charge.*

2dly, In what cases a rent may be apportioned by the act of *law*, or act of God.

3dly, The *manner* of such apportionment, and how the tenant shall take advantage of it.

And here first, we must distinguish between a rent *service*, and a rent *charge.*(*t*) For if a man who has a rent *service* purchases part of the

[*152] land out *of which the rent issues, the rent *service* is *not extinguished*, but shall be apportioned according to the value of the land; so that such purchase is a discharge to the tenant, for so much of the rent as the *value* of the land purchased amounts to.

But if a man has a rent *charge*, and purchases part of the land out of which the rent issues, the *whole* rent *is extinguished;* and consequently the tenant is discharged from the payment of it. And the reason of the difference is this: In case of the rent service,(*u*) the tenant is under the obligation of the oath of fealty, to bear faith to his lord, and to perform the services for the land which he holds of him; and this obligation has its force, while the tenure of the lord continues; and the tenure could not be discharged by purchase of part of the tenancy, for that construction would not only be attended with this absurdity, that the remaining part in the tenant's hands would be held of nobody; but in consequence

[*153] would produce this public inconveniency, that the remainder of *the tenancy would be free of all feudal duties, which in the height of the feudal tenures, must have been a detriment to the public: wherefore, since for this reason, the tenure between the lord and the tenant continued for so much of the land as remained unpurchased, the tenant, by his oath of fealty, was obliged to perform the services of it. But it were unreasonable and severe, to oblige him to the performance of the whole services that were reserved upon the old donation, because the lord had *wilfully* resumed part of the land, which was the consideration upon which the obligation to make the annual return of services was founded; and the *medium* between these two extremes was, that, since the enjoyment of the land was the consideration for the services, the return ought always to be made according to the proportion of the land which the tenant continued in possession and enjoyment of. But in the case of a rent *charge*, when the grantee purchases parcel of the land, the whole rent is extinguished, because there is no *feudal* de-

[*154] pendency between the grantor *and the grantee by the deed of grant which created the rent charge, as there was by the feudal donation which created the rent service. And therefore as these grants were of no benefit to the public, and afforded no addition of

(*t*) Lit. Sect. 222. (*u*) 8 Co. 105, b. Lit. Sect. 223.

strength or protection to the kingdom, the law carries them into execution, only so far as the rent could take effect, according to the original intention of it: and therefore, if the grantee had *wilfully*, by his *own act*, prevented the operation of the grant, according to the original intention of it, the whole grant was to determine. But when a rent charge is granted out of land, the rent issues out of every part of the land, and consequently every part of the land is subject to a distress for the whole rent; and therefore when the grantee purchases part of the land, it is become impossible, *by his own act*, that the grant should operate in that manner: because it is absurd, that the grantee should distrain his own lands, or bring an assize against himself. And therefore such grants, after such purchase, have been adjudged void: And the *rather, because, in their original creation, they were against [*155] the reason and the policy of the law; since they were so far from contributing to the strength of the kingdom, that they really weakened it, because the *tenant*, whose land was subject to such charge, was the less able to provide himself for the field, or to perform the duties of the feudal or military tenure; and the *grantee* was under no obligation of attendance, on account of the benefit he received from such grant,(*w*) and therefore such grants are said in the law books to be against *common right*. But in this case, if the grantor by deed, reciting the purchase, had granted; that the grantee should restrain for the same rent in the residue of the land; the whole rent charge had been preserved: because such power of distress, as is already shown, had amounted to a new grant.

But the law has carried the former position of *extinguishment* only to such cases where the grantee of the rent, *wilfully, by his own act*, prevents the operation of the grant according to *the original intention thereof. For,(*x*) if part of the lands *descends* to [*156] the grantee of the rent charge, the rent shall be *apportioned*, according to the *value* of the land. For the grantee, in this case, is perfectly passive, and concurs not, by any *act of his*, to defeat the intention of the grant: and therefore the law, which throws the land into his hands, that there may be immediately a tenant to perform the feudal duties, apportions the rent; lest the grantee should be discouraged to take upon him the burden of the feud, by the loss of the entire rent: and the rather, because it were unreasonable and severe, that the grantee should be punished in his property, without any default, or concurring in that act which extinguishes the rent.

And for the same reason, if the tenant makes a gift in tail of part of the land to the father of the grantee; the descent of that part, upon the death of the father,(*y*) shall not *suspend* the whole rent, during the continuance of the entail; but the rent shall be apportioned according to the value of the *land entailed. For *res inter alia, alteri nocere* [*157] *non debet*.

So if the father be grantee of a rent charge, and the son purchase part of the land; upon the death of the father the rent shall be apportioned, according to the value of the land purchased by the son; because the

(*w*) Co. Lit. 147, b.
(*y*) Co. Lit. 149, b.

(*x*) Lit. Sect. 224. 2 Rol. Ab. 236.

son contributes to the tenure of the rent of the lands in his hands,(*z*) and the law, by establishing such a course of descent, throwing the rent upon the son, it would be severe to punish the son, by the loss and extinguishment of the whole rent, for an act to which he contributed nothing; for that would be, to give him the rent according to the established course of descent, and give him no benefit by such descent, but to take it away from him at the same instant.

If land descends to two coparceners in fee, and one of them had a rent charge in fee issuing out of such land; it seems that the rent is lost, until *partition* made: because the grantee is seised *per my and per tout*,(*a*) that is, of the *whole and every part of the land; and consequently cannot distrain his own land for the rent. But after partition made, a moiety of the rent shall revive, upon the reason of the former cases: since the land was thrown upon her by the course of descent, without any concurrent act of her's; and therefore, having no interest in her sister's moiety after *partition*, she may well distrain for a moiety of the rent which issues out of it.

[*158]

If the father *within age* purchase part of the land, out of which his son has a rent charge, and he alieneth it *within age*, and dieth; if the son enters into the land, or recovers by a writ of *dum fuit infra ætatem*, in this case though the grantee *wilfully* brings himself into the possession of the land,(*b*) yet the rent shall be apportioned; because the right to the land is by descent, and without any concurrent act of his is thrown upon him; and the law gives a remedy suitable to that right; and it were absurd to say, that the law gives a man a remedy for *the recovery of his right, and yet lays him under a penalty not to prosecute that right as the case would be, if, upon the recovery of the land, the whole rent, which might be of much greater value than the land recovered, should be *extinguished* and not *apportioned*. So it is if the grantee had recovered by a *dum fuit non compos mentis*.

[*159]

So it is if a man seised in fee marries and then aliens his land; the alinee grants a rent charge of 10*l. per annum* to the husband and wife, and to the heirs of the husband, and the husband dies, the wife recovers a moiety of the feoffee for her dower by the custom; though she concurs to recover the possession, yet the rent shall be apportioned; because the law, giving her the remedy, shall not punish her for the execution of it,(*c*) by the extinguishment of the whole rent, which probably may be of greater value than the moiety of the lands.

Hence it is, that if a man grants a rent charge out of two acres, and afterwards the grantee recovers one acre *by title *paramount*, the grant of the whole rent shall remain unextinguished;(*d*) because the law, that gives the remedy for the recovery of a man's right, will not prevent the prosecution of such right, by depriving the prosecutor of greater profit than the thing recovered may amount to. But in this case there shall be *no apportionment*, but the grantee shall have the *whole* rent, after he has recovered the one acre: because upon the grant, each acre is charged with the whole rent; and, upon the recovery, it appears, that the grantor had no interest in one acre, and

[*160]

(*z*) Co. Lit. 149, b.
(*b*) Co. Lit. 150, a.
(*d*) Co. Lit. 148, b.
(*a*) Co. Lit. 150, a. 1 Rol. Ab. 236.
(*c*) Co. Lit. 150.

consequently could not charge it; and therefore the grant being to be taken most strongly against him, the *whole* rent shall continue after the recovery, because the rent was originally for so much, and therefore shall issue out of the lands which he had power to charge. Whereas in the former cases, the grantor had, at the time of the grant, power to charge all the lands; and therefore, when part of the land, subject to such charge, comes to the grantee by act of law, it is reasonable at least, that the charge shall *be apportioned, when part of the land originally subject to the charge comes to the grantee. [*161]

So it is if a man be seised of two acres,(*e*) one in fee, and the other in tail, and grants a rent charge in fee out of both acres; upon the death of the grantor, the whole rent shall issue out of the estate in fee: because, by the grant, the rent charge was to continue for ever; but the acre in tail could not bear its proportion of it *during the life of the grantor;* and, therefore, from the plain words of the grant, there shall be no apportionment of it: for then the grantee would have but an estate for life in the moiety of the rent, when, by the express words of the grant, he was to have an inheritance in the whole.

So if A. enfeoffs B. of one acre *upon condition,*(*f*) and B. being seised of another acre in fee, grants a rent charge in fee out of *both* to A., and afterwards A. enters for the condition broken into one acre; the rent is not apportioned, but the whole issues out of the other *acre: because, upon the condition broken, A. is revested in his old estate, and no charge of B. can any longer affect it, for A. claims by a title paramount to B. and the whole charge shall continue, because, by the grant, A. was to have an absolute estate of inheritance in the whole rent. [*162]

But if A. had made a lease for life, of the one acre to B. *without condition*, and B. had granted a rent charge out of both acres to A., and then B. had made a feoffment of, or committed waste in, the acre leased for life, and A. had entered for the forfeiture; in this case the rent shall be apportioned, because he comes in under the act of the grantor, and derives under his estate; and therefore shall not have both the estate from the grantor, and the rent issuing out of it: whereas in all the former cases the rent shall not be apportioned, because the grantor claims by a *title paramount* to the grant of the rent, and so avoids the charge *ab initio.* Yet, in this case, though the grantee comes under the estate of the grantor, the rent shall not be extinguished, *as it would be if the grantee had derived by purchase from the grantor; because the waste, and the feoffment of the tenant for life, were unlawful acts in themselves, and it were to encourage such injuries and wrongs, to suffer the person that commits them to receive any advantage or benefit from them; as B. in this case would, if upon A.'s entry for the forfeiture the whole rent had been extinguished. [*163]

And in some cases a rent charge may be apportioned by the *act of the party.*—As if the grantee *releases* part of his rent to the tenant of the land, such release does not extinguish the whole rent.—So, if the grantee gives part of it to a stranger, and the tenant attorns; such grant shall not extinguish the residue which the grantee never parted with:(*g*)

(*e*) Co. Lit. 148. (*f*) Co. Lit. 148.
(*g*) Co. Lit. 148, a. Cro. Eliz. 742, seems con'.

because such release or disposition makes no alteration in the original grant, nor defeats the intention of it, as the purchase of part of the land does: for the whole rent is still issuable out of the whole land, and laid
[*164] according to the original intention of the grant.—Besides, since the *law allowed of such sorts of grants, and thereby established such sorts of property, it would have been unreasonable and severe, to hinder the proprietor from making a proper distribution of it, for the promotion of his children, or to provide for the contingencies of his family, which were in his view.

The objection that has been made against these sorts of appointments of division of rent charges is this, that the tenant thereby would be exposed to several suits and distresses for a thing which, in its original creation, was intire, and recoverable upon one avowry. But the answer to this is obvious; that it is in the tenant's choice, whether he will submit himself to that inconveniency, (if it may be so called,) because the grantee can make no benefit of the grant by *distress*, without consent or attornment of the tenant; nor by assize, without obtaining seisin of it from the tenant; and therefore there can be no objection from the tenant to what himself has consented to and approved of.

[*165] *And if a rent charge may be partly assigned by the grant of the party, much more may part of it be *extended* for his debts, by the favour and assistance of the law;(*h*) for though the tenant is thereby, without his attornment, possibly made liable to several suits and distresses, yet it is an inconveniency he may avoid by a punctual performance of his own grant.

But here it is further inquirable, in what cases a *rent service* shall be apportioned, and that by either act of law, or act of the tenement. We have already observed, that if the lord purchase part of the tenancy, the services shall be apportioned.—But here we must distinguish between services *divisible* in their nature as rent;(*i*) and such as are *indivisible*, as a horse, a hawk, &c.: for in the last case, if the lord purchase part of the tenancy, there can be no apportionment of the service from the nature of the thing, and therefore such service is *extinct*, and the tenant discharged from the payment of it; for the whole tenancy being equally
[*166] chargeable with the payment *of such services, the lord, *by his own act*, shall not discharge part, and throw the whole burden upon the residue, for his own private benefit and advantage.

But if such an entire service were for the benefit of the public,(*k*) as *knight's service*, and *castle guard*, for the defence of the realm, or the administration of justice;—or if such entire service was the work of *charity* or *piety;*—in all such cases, the tenant is still chargeable with the whole service: for there can be no *apportionment*, because the thing in its nature is indivisible; and the whole shall not be *extinguished*, because the public has an interest in such services, and therefore shall not be prejudiced by the private transactions of the parties.

Yet if the tenure be by *knight's service*,(*l*) though for the former reason it shall not be apportioned, yet, if *escuage* be assessed on the tenant for not attending his lord in the field, such escuage being only a penalty,

(*h*) Cro. Eliz. 742. Worton v. Shirt.
(*i*) 6 Co. 1, b. Buerton's case. Co. Lit. 149, a. 8 Co. 155, a. Moor, 203.
(*k*) 6 Co. 1, 2. Co. Lit. 149, a. (*l*) Co. Lit. 149. Lit. sect. 223.

or a sum of money, due to the lord for non-attendance, shall be apportioned: *and the tenant shall only be obliged to pay his proportion of it, according to the value of the lands remaining [*167] in his hands after the purchase; because now it is become a private emolument to the lord, in which the public has no share.

But where the tenure is by a service in its nature *indivisible*,(*m*) as by a horse, or a hawk, &c., which are only for the private benefit or pleasure of the lord; yet if part of the tenancy comes to the lord by *descent*, the service is not extinguished: because here is no consent or concurrence of the lord to the division of the tenancy, but the tenant has multiplied the services by his feoffment, as hereafter shall be shown; and the father of the lord, who is the feoffee, as well as the feoffor, holds under the feoffment of the tenant by the service of an horse or an hawk, and therefore when the father dies, and that part of the tenancy which he claimed by the feoffment of the tenant thereby devolves upon the lord by the established rule of descent, such descent can only extinguish *the service which was paid to the lord for the land descended, but can make no charge or alteration in the service [*168] by which the tenant held after his own feoffment.

There is one exception to the reason of this last case,(*n*) and that is by the statute of Marlebridge, chap. 10, which provides, "*quod si plures feoffati fuerint de hæreditate de qua communia secta debeatur, dominus unicam sectam habeat:*" and therefore put the case, there be lord and tenant by homage, fealty, and suit of court, and the tenant aliens several parts of his tenancy to several men; the suit of court is not multiplied by such several alienations; for the statute says, "*dominus unicam sectam habeat:*" and, therefore, every feoffee being obliged to the performance of that suit, whoever performs it to the lord, shall have contribution of the rest. But if the father of the lord were one of the feoffees, and he dies, whereby his interest descends to the lord, the whole suit is lost, and the tenants absolved from the performance of it; *because they can have no contribution from the lord: [*169] for that in effect were to make the lord do suit to himself.

But in all cases, whether part of the tenancy comes to the lord by purchase,(*o*) or by descent, the *homage*, and *fealty* are still due to the lord for the remainder of the tenancy; because by those, the tenant undertakes to bear faith and homage to his lord for all the lands that he holds of him: and, therefore, while there is any tenure of the lord, the obligation arising from such engagement must continue, and consequently the tenant is not absolved from them by the lord's purchase of part of the lands, since the tenant still holds the residue of the lands.

And hence by the way it is, that, if the tenant aliens part of the land, the services of homage and fealty *multiply* to the lord, that is, the feoffor is not absolved from the obligation of them, because he originally performed them for every part of the land which he held from the lord; and, therefore, *while any part remains in his hands, the obligation to the performance of them continues. And since [*170] the statute of *quia emptores*, &c. the feoffee must hold of the same lord.

(*m*) Co. Lit. 149.
(*n*) F. N. B. 159, b. 6 Co. 1. Co. Lit. 149, a. 2 Inst. 120. Plow. 240, b.
(*o*) Lit. sect. 223. 6 Co. 1. Co. Lit. 149. 8 Co. 105, b.

But these services are in their nature indivisible, and therefore the construction upon the act, has been, that the services should *multiply* to the lord, because otherwise part of the land had been drawn out of his homage without his consent, and such part must be held of nobody, because whoever holds of any lord must at least engage himself by the oath of fealty, to be faithful to his lord for the lands that he holds of him.

So if the tenure had been by homage, fealty, and a horse, hawk, or spur; if the tenant aliens part, the services shall multiply, and both feoffor and feoffee shall each of them pay a horse, hawk, or spur, to the lord.—But if the tenure has been by any *corporal* service, as to be butler to the lord; steward or bailiff of his manor;(*p*) or to cover, or repair his house; [*171] or to reap or thresh his corn; in all these *cases, upon alienation of part, such personal services shall not multiply.

If there be lord and tenant by fealty and heriot service,(*q*) and the tenant aliens part of the tenancy, the alienee shall hold by a distinct heriot service, for the services shall multiply for the former reason.—And if, after such alienation, the lord purchases the residue of the tenancy, only the heriot service due from the first tenant shall be extinguished; because by the alienation, each held his proportion, by a separate and distinct tenure; and, therefore, if the lord purchases one tenancy, that can no way affect the services of his other tenants: but if the lord, before the tenancy has been separated and held by two distinct tenures, purchased part of it, the whole heriot service had been extinct, for the reason already given, for the extinguishment of a rent service which is not in its nature to be divided.

But if the heriot was due by the custom of the manor,(*r*) that upon [*172] the death of every tenant of the manor *the lord should have a heriot; here, if the lord purchases part of the tenancy, it shall not extinguish the custom; because the lord has purchased only part, and the tenant, on account of the residue, is still within the lord's homage, and tenant of his manor; and, consequently, upon his death, as upon the death of every other tenant of the manor, the lord is intitled to the heriot.

In the next place it is to be considered, whether a rent service, *incident* to the *reversion*, may be *apportioned* by the grant of *part* of the *reversion*.

It seems formerly to have been doubted, whether upon such grant there could be any apportionment, or whether the whole rent should not be extinguished and lost;(*s*) for since the reversion and rent incident thereto were intire in their creation, they thought it hard, that by the act of the lessor they should be divided, and thereby the tenant made [*173] liable to several actions and distresses for the recovery of them. *But this conception was too narrow and absurd to govern men's property long: for if I make a lease of three acres, reserving 3*s*. rent, as I may dispose of the whole reversion, so may I also of any part of it, since it is a thing in its nature severable; and the rent, as incident to the reversion, may be divided too, because that, being made

(*p*) 8 Co. 105, b.
(*q*) 2 Co. 104, b. 105, 106. Talbot's case. Co. Lit. 149.
(*r*) 8 Co. 106. 2 Brounl. 206.
(*s*) Inst. 504. 1 Rol. Ab. 2345. Cro. 851. West v. Lassel. Co. Lit. 148, a. 8 Co. 79, b. Cro. Eliz. 651. Dy. 386. Hob. 177.

in retribution for the land, ought, from the nature of it, to be paid to those who are to have the land upon the expiration of the lease. And hence it is, that the rent passes immediately with the reversion, without any express mention of it in the grant. But the tenant has really no prejudice from such grant, because it is in his power, and it is his duty, to prevent the several suits and distresses, by a punctual payment of the rent; and therefore he ought not to complain of a mischief, which he has wilfully brought upon himself. Besides, formerly such grants could not take effect without the attornment of the tenant. But, on the other hand, it would be extremely prejudicial, if, upon such grants, the rent should not be apportioned; because then *the lessor could not out of his property make a provision for his younger children, or answer the contingencies of his family which are in view. [*174]

And upon this reason, the apportionment of rents has been carried a step farther.—As if A. possessed of a term for 20 years,(*t*) leases it for 10 years, reserving 30*l.* rent; and afterwards A. deviseth 20*l.* of the rent to three of his sons, equally to be divided: this is a good devise, and each of the sons shall have an action of debt for his third part, though the reversion, to which the rent originally was incident, remains intire; for there is nothing in the nature of the thing to hinder such a division or apportionment; and, if the tenant omits to pay the rent, the several actions are mischiefs which he brought upon himself, and which he might, and ought, to have prevented.

If the king's tenant leases for years, and grants the reversion of two parts,(*u*) and dies, being in *ward* for the third part which descended; if the king *grants the third part over, the grantee shall have an action of debt for the third part of the rent; because by the grant in tenant's life-time of two parts the rent was apportioned, and the third part of the rent was not extinguished, but incident and attending that part of the reversion which descended; and therefore the grantee, that has the part of the reversion, has a right to the rent incident to it. [*175]

If a man makes a lease for years of land, and a stock of sheep,(*v*)—or leases a house with the furniture in it,—reserving rent, and afterwards enters the premises, and makes the feoffment; if the lessee re-enters, the feoffee is intitled to the whole rent: and there shall be no apportionment of it on account of the *furniture* or sheep; because the rent issued out of the land, and the sheep or furniture, though they might be taken as pledges, yet no rent can be reserved out of the use of them, because nothing can yield a rent, that the lessor cannot at any time have a recourse to for a distress: but these things may be moved or driven from *the premises, and so taken out of the distress of the lessor: wherefore in this case, since the lessor by the feoffment has conveyed his whole estate, the reversion, and rent incident thereto, after the re-entry of the lessee, is in the feoffee. So, and for the same reason, if the land had been evicted by title paramount, there shall be apportionment of the rent on account of the goods, but the lessee, it seems, in this case, shall enjoy them during the term, without paying any rent. [*176]

(*t*) Cro. Eliz. 637. 651. 2 Rol. Ab. 237.
(*u*) Cro. Eliz. 851. West v. Lassely. 2 Rol. Ab. 234.
(*v*) Dy. 212, b. Bendl. pl. 127. Cro. Eliz. 256.

So it is, if A., seised in fee of one acre, and possessed of a term of years in another acre, grants a rent out of *both* to B. in fee; and takes a lease or grant of the leasehold; here the rent shall not be thereby suspended; for though that acre was subject to a distress for non-payment, yet the term for years being but a chattel is an improper fund for a freehold rent to issue out of: for, if that construction were admitted, the grant, which was in its creation uniform, must in consequence be broken and divided; and part of the rent must determine upon the expiration *of the term, while the other part, that issued out of the inheritance, must, according to the design of the grant, be payable for ever: wherefore, in such cases, to preserve the grant uniform, according to the original intention of it, the rent is taken to issue out of the fee simple only; and consequently a purchase, or taking a lease of the leasehold acre, shall not extinguish or suspend the rent.

[*177]

If lessee for life or years surrenders part, or if he commit a forfeiture of part, by making a feoffment or doing waste, the rent shall be apportioned; because the rent is a retribution for the land, and therefore must necessarily cease, according to the proportion of the land resumed by the lessor: for it were absurd, that the lessor should have both the land, and the retribution for it: but the whole rent is not extinguished, because, from the nature of the contract, the rent is to be paid in consideration of the enjoyment of the land; and therefore the tenant shall be obliged to pay the rent in proportion to the land he enjoys.

[*178] *But if the lessor takes a lease of *part* of the land, or enters *wrongfully* into part; there are variety of opinions, whether the *intire* rent shall not be *suspended* during the continuance of such lease or tortious entry. Some have held, that there shall be no apportionment in either case, but that the whole should be suspended;(*w*) for this reason I suppose, because, by the demise, every part of the land was equally chargeable with the whole rent; and therefore, the lessor shall not, by his own act, discharge any part from the burden, during the continuance of such contract. This indeed may be a good reason, why the whole rent service shall be suspended, if the lord or lessor *disseises* or *ousts* his tenant or lessee of any part of the land; because this is a *wrongful act*, to which the tenant consented not: and if it were not attended with a total suspension of the rent, until he makes restitution of the land it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract; and so, by taking *that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense and trouble to restore himself to such part by course of law. Therefore, to prevent these inconveniences, and that no man might be encouraged to injure or disturb his tenant in his possession, when, by the policy of the feudal law, he ought to protect him and defend him; these resolutions have been: and so the law is at this day, that such *disseisin* or *tortious entry* suspends the whole rent, and the lessee or tenant is discharged from the payment of any part of it, till he be restored to the whole possession.

[*179]

But there is no colour or reason why the whole rent should be sus-

(*w*) Co. Lit. 148, b. Bro. Tit. Extin. 43. 1 Rol. Ab. 938. 4 Co. 52. b. 8 Co. 135, a. Pollex. 142, 144.

pended,(x) when the lord or lessor *takes a lease* of part of the land; because here is the concurrence of the tenant, who, by his own act and consent, parts with so much of the land as is re-demised, and thereby supersedes the former contract as to such part. But since the obligation to pay the rent, was, by the first contract, founded *upon the consideration of the tenant's enjoying the land; that obligation must still continue on the tenant, so far as it is not cancelled or revoked by any subsequent contract between the parties: and consequently,(y) the whole rent shall not be extinguished by such re-demise, but the tenant shall pay rent in proportion to the land he enjoys; because the obligation of the first contract must subsist so far as the tenant enjoys the consideration which first engaged him in such obligation. [*180]

And by the opinion of the Lord Chief Justice Hale, if the tenant, upon such re-demise, reserved a rent, no part of the rent reserved upon the *first* contract shall be suspended: for the reason, why part of the rent shall be suspended where there is no reservation on the re-demise,(z) is because the tenant shall be obliged to make return of rent, so far as he has a consideration for it: and therefore, when he parts with part of the land to the lessor, *without reservation*, he wants part of the consideration upon which the obligation to pay the whole rent *was founded: wherefore the obligation for so much loses its force. But where such re-demise is made, *with a reservation* of rent, there the tenant himself has substituted a consideration, in the place of the land which was the original consideration for the payment of the intire rent, so that the old contract may be preserved uniform and intire, and continue in its full force: and therefore he is not intitled to the abatement which the law would give him, since he, by the reservation, has ascertained it himself. [*181]

If the tenant in this case had leased to a stranger, *part*, without reserving any rent, and the stranger assigned his interest to the lessor there should be no *apportionment* or *suspension* of any part of the rent: because here, the tenant, by leasing part, had made himself answerable for the whole rent; and the lessor, claiming under a stranger, is intitled to the full benefit of his contract.(a)

If there be lord and tenant by knights service, and the tenant dies *his heir within age; and the lord seises his ward, and enters into the land; this suspends the signory during the minority of the infant: because, in the infancy of the ward, the lord has the intire profits of the land, and consequently, during such perception of the profits, there can be no tenant to answer the seignory; for it were absurd, that the lord should be accountable to himself for his own seignory, because that were to make him both lord and tenant, at the same time, of the same lands. [*182]

But if the wife recovers the third part of the tenancy for her dower,(b) the seignory for so much is revived: because the lord has no longer the perception of the profits of that third part; and the wife takes it under

(x) Vent. 277. Co. Lit. 148, b. 9 Co. 135, a.
(y) Pollex. 141, 145. 1 Vent. 176, 7. 2 Lev. 143. 3 Keb. 500. 1 Rol. Ab. 938 Dorrel v. Andrews.
(z) 1 Vent. 276.
(a) 1 Vent. 276. Co. Lit. 148, b. 9 Co. 135, a. 1 Rol. Rep. 939.
(b) 9 Co. 135. Co. Lit. 148, b.

the same services the husband held it, and consequently must perform them, in proportion to the value of the land of which she is endowed.

So if the tenant dies,(*c*) leaving two daughters, one an infant, and the other of full age; and the lord seises the *ward: his seignory is suspended but for a moiety; for the daughter of full age, shall be so far obliged to answer the seignory, as she enjoys the condition upon which the tenant's obligation to perform the whole was founded.

[*183]

If there be two joint-tenants, or coparceners of a seignory and one disseises the tenant, this shall suspend but a moiety of the seignory; for his companion shall not be prejudiced by his injurious act, to which he was no party: And therefore, after such disseisin, the disseisor is liable to the distress of his companion for his moiety of the seignory. So that we see, where the tenancy is *united* in the *same hand* with the *service* or *seignory* issuing out of it, if that union be but *temporary*, that is, if the estate or interest in both be *not* of *equal duration*, such union makes but a temporary discharge of the service:—But if the estate or interest in both be of *equal duration*, such union makes a perpetual discharge of the rent; and in that case rent is said to be *extinguished:* because it is absurd, that any man should be *accountable to himself, for services or rent which are due to himself; or that he ought to have any return of rent, or other service, for land which he enjoys and takes the profits of. And this holds as well where the tenant takes a lease of the seignory, or purchases it; as where the lord takes a lease, or purchases part of the tenancy: for, in either case, there is an union of the land and service in the same hand, and no man can be accountable to himself for any service.

[*184]

But if there be lord and tenant;(*d*) or lord, mesne and tenant; and the lord or mesne grants the seignory, or mesnalty, to the use of *himself*, for *life*, remainder to the tenant, in tail; this is no immediate suspension of the rent: because the tenant has no immediate benefit from the grant, and there can be no suspension until the remainder in tail executes in possession, because the services are due and payable to the tenant for life, and he is sufficient to answer the superior lord's avowry, and the stranger's *præcipe*.

*So it is if A. be tenant in tail; the remainder to B. in tail, and A. grants a rent charge to B. in fee; this is a good grant, and the rent shall not be suspended; because the possession of the land with the perception of the profits are in different hands, and therefore there can be no suspension of the rent, till the possession and rent unite in the same hand, by the execution of the remainder: and then the rent shall be suspended, because it is absurd, that any man should be accountable to himself, or chargeable with a rent issuing out of his own land. So it is if B. had purchased a rent charge from a stranger issuing out of the land intailed.

[*185]

But in the former cases, if the lord grants his seignory for years,(*e*) the remainder to the tenant for life; or if the mesne grants the mesnalty to the use of himself for life, the remainder to the tenant in fee; in both these cases, the rent shall be suspended.

(*c*) 9 Co. 135, b.
(*d*) Co. Lit. 143. b. Pollex. 144.
(*e*) 9 Co. 134, 135.

**In what cases the rent shall be apportioned by the act of God, or Law.* [*186]

And in this place we are to consider, whether the tenant shall pay the *whole* rent, though part of the thing demised be lost and of no profit to him; or though the use of the whole be for some time intercepted, or taken away, without his default.—And here it seems extremely reasonable, that if the use of a thing be intirely lost, or taken from the tenant, the rent ought to be abated or apportioned; because the title of the rent is founded on this presumption, that the tenant enjoys the thing during the contract:(*f*) and therefore, if part of the land be surrounded or covered by the sea, this being the act of God, the tenant shall not suffer by it; because the tenant, without his default, wants the enjoyment of part of the thing which was the consideration of his paying the rent; nor has the lessor reason to complain, because, if the land had been in his *own hand, he must have lost the profit of so much as [*187] the sea had covered.

But if part of the land be burned with *wild-fire*,(*g*) that shall make no abatement or apportionment of the rent: because the use of the land is not thereby taken away or interrupted; it may indeed, be thereby rendered less profitable; but that seems to be a common accident, that land shall yield more one year than another; and it seems, that the land in this case may be restored in a great measure to its fertility, by the care and industry of the tenant.

If a lease be made of land with a stock of sheep, and all the sheep die; it seems doubtful, whether the rent shall be apportioned, or the lessee be obliged to pay the whole rent: for though it may well be presumed, that the rent was advanced upon the account of the profits which arise from the sheep, *&c.;* yet, since the rent is taken to be issuing only out of the land, because that, being in its nature *unmoveable, is still subject to the distress, which the sheep are not *longer* than [*188] they are on the land; it may be doubted, whether the rent shall be abated, while the tenant enjoys all the land out of which the rent issues. *Quære.*

If A., seised of one acre in fee,(*h*) and possessed of another acre for years, makes a lease of both, reserving rent, and dies; the rent shall be apportioned with the reversion, and the *heir* and *executor* shall have each his proportion.

If a moiety of a reversion be extended by *elegit*,(*i*) the rent shall be apportioned; and the lessor shall still enjoy half the rent, as incident to the reversion that remains in him.

So if a husband leases for years, reserving rent, and dies; the wife having a third part of the reversion for her dower, she shall have the same proportion of the rent. For in all these cases, the law distributes the rent, as it disposes of the reversion; since the rent is the retribution which *the tenant makes, to those who are intitled to the perception of the profits of the land itself, if the lease were expired. [*189]

(*f*) 1 Rol. Ab. 236.
(*g*) Dy. 56, a. 1 Rol. Ab. 236.
(*h*) 1 Rol. Ab. 239.
(*i*) Ib. Cambell's Case.

The Manner of making Apportionment.

And this is properly the business of a *jury*,(*k*) who, upon the evidence offered, are to judge of the value of the lands purchased by the lord or lessor; or aliened by the tenant, according to the statute of *quia emptores &c.*, from whence it is for them to compute, how much is due from the tenant for the residue of the lands in his hands.

This may be done by a plea of *nil debet* pleaded by the tenant;(*l*) (because, when issue is joined on such plea, it is the business of the *jury* to determine, whether any thing, and how much, is due; and this is done with regard to the *real value* of the land remaining in his hands, and not with regard to the quantity of it.—Note, the tenant may set forth the value of
[*190] the land purchased by the lessor in his pleading, *and conclude, that the rent ought to be apportioned.

But the rent cannot be apportioned upon a *demurrer;* because the judges only determine what is law in such case, but the value of the land never comes in question. As if an action of debt be brought for rent, and the defendant pleads, that the plaintiff entered part: the plaintiff replies, that he ought not be foreclosed of his action, for that the defendant had let that part to F., and therefore did not enter: now in this case there could be no apportionment; because the only point to be determined by the court was, whether the plaintiff, claiming part under the demise made by the defendant to F., and the plaintiff entering into that part under that title, had suspended the whole rent: and when that was determined for the plaintiff, he must have judgment for the whole demand.

If there be lord and tenant by fealty, and 20*s.* rent, for 20 acres,
[*191] *and the lord purchases two acres, and then distrains for 18*s.* rent; supposing the rent to be apportioned, according to the quantity of the land; the tenant rescues, and the lord brings his assize, and the tenant pleads *nul tort:* the recognitors of the assize shall extend the land according to the real value;(*n*) for the jury, upon view of the land, are capable of judging of the value, of each acre; and therefore, if they find the two acres aliened of better value than the rent, they may apportion the rent accordingly, and give the lord but 16*s.* for the remaining 18 acres: and though the lord demanded more than his due, yet he shall have no more than in justice he ought to have; because it were unreasonable to expect the lord should exactly judge of the value of the land, and consequently too severe, to put the tenant to the expense of a fresh suit for such mistake.

But in this case, if the lord demand less than his due, he shall recover
[*193] no more than what he demanded: because *the courts must give judgment correspondent to the right of the demand; and that can appear no otherwise, but from his own showing.—Besides, if the court gave judgment for more than was demanded; their judgment would be erroneous, having no foundation to support it, because they would give judgment for a thing not judicially before them.

(*k*) 1 Vent. 276. 1 Rol. Ab. 237. (*l*) 1 Vent. 276.
(*n*) 2 Inst. 503. 1 Rol. Ab. 237.

INDEX

The pages referred to are those between brackets, [ ].

THE END.